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Issued Quarterly by the

MASSACHUSETTS BAR ASSOCIATION, 60 State St., Boston, Mass.

NOTICE TO MEMBERS
AS TO THE CARNEGIE FOUNDATION BULLETIN
ON "JUSTICE AND THE POOR."

The secretary has been informed that the Carnegie Foundation will supply a copy of its recent report containing the study entitled "Justice and the Poor," by Reginald H. Smith, Esq., formerly counsel for the Boston Legal Aid Society, without charge to any member of the Massachusetts Bar Association, who notifies the secretary, of his desire to receive a copy.

This book is the most thorough study of the subject which has yet been made in this country.

Requests for copies should be sent to

F. W. GRINNELL, Secretary,
Massachusetts Bar Association,
60 State Street, Boston.

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IS THE REARRANGEMENT OF THE CONSTITUTION
OF MASSACHUSETTS SUBMITTED BY THE CON-
STITUTIONAL CONVENTION TO THE PEOPLE
AT THE STATE ELECTION ON NOVEMBER 4,
1919, A NEW CONSTITUTION OR MERELY A CON-
VENIENT DIGEST OF THE OLD CONSTITUTION?

This article is written to demonstrate the fact that the Rearrangement has no legal effect whatever and the Constitution of 1780 and its amendments will remain as the fundamental law of the Commonwealth to be "prefixed" to all future editions of the laws and that the Rearrangement will also be printed with it but merely as a convenient digest.

Obviously this question is of peculiar importance and the answer and the reasons for the answer should be generally understood as promptly as possible to avoid confusion.

It was felt by many members of the convention, as it was felt by a good many members of the bar, that it would be more convenient for those who had occasion to consult the constitution to have the document with its amendments rearranged into a single document so that the amendments should appear in their proper places and the repealed portions of the original instrument omitted, etc.

Accordingly, when the constitutional convention finished its work of considering what amendments it would propose in the summer of 1918 the following order was adopted:

Ordered, That a special committee on Rearrangement of the Constitution, to consist of the President and eighteen other members of the Convention to be appointed by the President, shall, after the submission to the people of all the amendments proposed by the Convention, arrange the Constitution, as amended, under appropriate titles and in proper parts, chapters, sections and articles, omitting all sections, articles, clauses and words not in force, and making no substantive change in the provisions thereof. And printed copies of the report of such committee, containing the draft and arrangement so made

as aforesaid, and showing in detail any and all omissions and any and all alterations in punctuation and phraseology, shall be mailed to each delegate of the Convention; and

Ordered, further, That, when this Convention closes its present session, it shall adjourn, subject to call by the President or Secretary, to meet not later than within twenty days after the prorogation of the General Court of 1919, for the purpose of taking action upon such report. Any rearrangement of the Constitution with its amendments, made and adopted by the Convention, shall be submitted to the people for their ratification and adoption in such manner as the Convention shall direct.

—JOURNAL OF AUGUST 20, 1918, p.

This committee consisted of the following members of the convention:

PRESIDENT, JOHN L. BATES of Brookline.
 JAMES M. MORTON of Fall River.
 ALBERT E. PILLSBURY of Wellesley.
 JOSEPH WALKER of Brookline.
 AUGUSTUS P. LORING of Beverly.
 HERBERT PARKER of Lancaster.
 ALBERT BUSHNELL HART of Cambridge.
 ALBERT H. WASHBURN of Middleborough.
 JOHN W. CUMMINGS of Fall River.
 ASA P. FRENCH of Randolph.
 CHARLES E. HIBBARD of Pittsfield.
 PERCY G. BOLSTER of Dorchester.
 JAMES F. CREED of Dorchester.
 GEORGE R. JONES of Melrose.
 LOUIS SWIG of Taunton.
 FRANK F. DRESSER of Worcester.
 JAMES P. RICHARDSON of Newton.
 ARCHIE N. FROST of Lawrence.
 FRANCIS P. GARLAND of Somerville.

This committee, in turn, provided for a special committee of five to prepare a draft of the rearrangement. The special committee of five consisted of the following gentlemen:

JAMES M. MORTON, *Chairman.*
 ALBERT BUSHNELL HART, *Clerk.*
 AUGUSTUS P. LORING.
 HERBERT PARKER.
 ALBERT E. PILLSBURY.

The work of rearrangement was performed with great care and the plan of the work as finally reported to the convention by the general committee is explained in the report of the special committee which was adopted and submitted to the convention in August, 1918.

That report was as follows:

REPORT OF SPECIAL COMMITTEE ON ARRANGEMENT OF CON-
 STITUTION AS AMENDED.

AUGUST, 1919.

The special committee appointed pursuant to the order of the convention of August 20, 1918, "to arrange the Constitution as amended" has performed the duty assigned to it, and submits the following report, with a copy of the proposed rearrangement of the constitution and amendments accompanying the same as Document No. 2, July, 1919, as a part thereof.

The order under which the committee was appointed provides that the committee shall "arrange the constitution as amended under appropriate titles, and in proper parts, chapters, sections and articles, omitting all sections, articles, clauses and words not in force and making no substantive change in the provisions thereof." It also provides that "printed copies of the report of such committee containing the draft and arrangement so made as aforesaid and showing in detail any and all omissions and any and all alterations in punctuation and phraseology shall be mailed to each delegate of the convention" which has been done.

Document No. 1 accompanying this report is a reprint of the constitution with all amendments made only for the convenience of the committee and the convention.

Document No. 3 shows the omissions and transpositions as required by the order of the convention.

The object of the order was, as the committee understands it, to have the existing constitution and its amendments, sixty-six in all, brought together in one body, omitting all "sections, articles, clauses and words" which by the lapse of time, or by repeal, or annulment, or otherwise have ceased to be in force, and making such rearrangement, with the changes in phraseology and punctuation necessarily involved, as would form a consistent and connected whole. *The committee are of opinion that it manifestly was not intended that they should draft a new constitution embodying the existing constitution and amendments, and they have not attempted to do so. They have considered that their duty in that regard was confined to one of rearrangement.* The committee have construed the order to mean that it was the will and purpose of the convention that no change in the existing constitution and its amendments should be made by the committee which would or might in any way affect their meaning or present construction, or the construction which has heretofore been given to the provisions thereof, and they have carefully refrained from making any change which, it seemed to them, would or might have that effect.

Where there was an obvious omission, or a manifest ambiguity, as there seems to have been in a few cases, or where a change in phraseology or punctuation was rendered necessary by the rearrangement, or by the omission of words, phrases or articles, and when it was clear that another word or phrase should be substituted for the one used, to secure consistency, or uniformity in language, the committee deemed that it came within the scope of their duty to supply such omissions or remove such ambiguity or make such changes, and they have done so. The textual changes so made have been comparatively few.

The committee have transposed articles and provisions where such transposition seemed to them to effect a better and more logical arrangement. In no instance was any change of meaning or substance intended by, nor has any as the committee believe resulted from, such transposition. Changes in phraseology are shown or intended to be shown in the rearrangement by italics. The omissions and transpositions appear, as already observed, in Document No. 3 accompanying this report. It has been impossible to indicate

the changes in punctuation otherwise than by a comparison of the text of the proposed rearrangement with the original text of the existing constitution and amendments.

In the main the committee have followed the general arrangement of subjects in the existing constitution, putting the various amendments now in force in the respective places where they appear to belong. They have deemed it wisest that the textual and other changes above referred to should be as few as possible consistently with the rearrangement intended. Except in the cases referred to above, and the cases where articles or clauses have been omitted as no longer in force, the present text of the constitution and amendments has been strictly adhered to.

The division heretofore existing into Part the First and Part the Second, each being further sub-divided into chapters, sections and articles has been abandoned as confusing and inconvenient, and instead thereof the proposed draft, after the Preamble, is arranged in articles consecutively numbered from beginning to end. Related articles have been grouped together under captions or headings descriptive of the subjects to which they belong, following here also in the main the arrangement heretofore existing. The committee have construed so much of the order as provides for an arrangement with "appropriate titles and in proper parts, chapters, sections and articles" as directory rather than restrictive, and have felt at liberty to adopt such method of arrangement as seemed to them on the whole the simplest and most convenient.

The amendments relating to the Initiative and Referendum, to the Budget, and to Lending the Credit of the Commonwealth, the two latter being grouped together under one caption or heading, have been included in the Legislative Department. For purposes of convenience, some new divisions and titles have been introduced, but without, as the committee believe and intend, affecting the construction. The title of Receiver-General used in connection with that of Treasurer has been omitted as no longer of any significance.

While the report is substantially unanimous, it is proper to say that some differences of opinion exist in the committee. It should be noted, however, that in only one instance is there any difference of opinion as to what has been omitted as no

longer in force. Such other differences as there are relate mainly to matters of arrangement.

For the Committee,

JAMES M. MORTON,
Acting Chairman.

The rearrangement referred to in the above report as Document No. 2 was, with a single amendment, adopted by the constitutional convention for submission to the people.

The final article of the original constitution of 1780 provides as follows:

“This form of government shall be enrolled on parchment and deposited in the Secretary’s office, and be a part of the laws of the land, and printed copies thereof shall be prefixed to the book containing the laws of this Commonwealth, in all future editions of the said laws.”

This final article is generally overlooked by those persons in the community who have a notion that the action of courts in declaring statutes unconstitutional has been the result of some form of implied authority or, in the minds of some persons, of usurped authority. As a matter of fact, however, as any one will see who reads this article carefully, it is an express declaration that the Constitution shall be printed with every edition of the laws as part of the law of the land so that every judge in the commonwealth before he reads a single statute shall be expected to read the fundamental and controlling law which appears in the constitution in the light of which all the statutes which follow must be tested. This is the significance of the fact that the constitution must be “prefixed” to all future editions of the laws. This article, therefore, is of great importance. It also appears as the last article, Number 158, of the rearranged document submitted to the people.

There is, however, one entirely new article in the rearrangement which reads as follows:

“Art. 157. Upon the ratification and adoption by the people of this *rearrangement* of the existing constitution and the amendments thereto, the constitution shall be

deemed and taken to be so rearranged and shall appear in such rearranged form in all future publications thereof. Such rearrangement shall not be deemed or taken to change the meaning or effect of any part of the constitution or its amendments as theretofore existing or operative."

This article, following carefully the discriminating words which were used in the votes of the convention and the reports of the committees and which appear expressly in the question placed upon the ballot, is an express declaration that the document now submitted to the people is merely a rearrangement and is not in any sense a new and substituted instrument which is to take the place of the old constitution and its amendments as the legally binding constitution of the Commonwealth.

But, it is specifically stated in this new article, that this rearrangement "Shall appear in such rearranged form in all future publications" of the constitution, although it is stated in the same article that in order to determine any uncertain questions of construction the original constitution and its amendments must be examined. This provision means of course that the original constitution and its amendments continue to be the fundamental law of the Commonwealth, and Article 157 of the rearrangement expressly denies any intention of changing the meaning of the last article of the original constitution which requires that the original and legally binding document shall be prefixed to all future editions of the laws.

In view of the dangers of producing unexpected results in meaning which always exists in attempting to re-phrase so important a document as the Constitution of Massachusetts which has been the basis of government and which has been repeatedly construed by the courts for almost a century and a half, the convention and the Committee on Rearrangement were naturally desirous of avoiding any such unexpected results as the rearrangement was to be passed for the purpose of convenience and not for the purpose of changing the meaning. This is the obvious reason for Article 157.

It appears, therefore, that when this rearrangement is adopted there will be a direct mandate from the people that

both the rearrangement and the original instrument with its amendments in their chronological order shall be prefixed to all future editions of the laws, the one for convenience and the other for ultimate examination and controlling force as to the meaning.

In view of the importance of the question other extracts from the records of the convention are quoted as follows for the convenience of the bar.

In the memorandum submitted to the convention by the Committee on Rearrangement showing in detail the changes made with an explanation of their reasons, there is the following note of explanation in regard to Article 157, which was numbered 156 in the Report of the Committee:

“CONTINUANCE AND ENROLLMENT.

Art. 156. This is a new division and title. It adopts in part the language of the Act for calling and holding the convention (Acts of 1916, ch. 98), and is introduced to show that the proposed draft, if adopted, is to be regarded as a continuation of the existing constitution and amendments so far as the provisions thereof are in force, and that no substantive change in the present meaning and construction or that which has been heretofore given to them is intended.”

The language of Chap. 98 of 1916 under which the convention was called, which is referred to in the above note, is the latter part of Sec. 6 stating that the delegates to the convention, when organized,

“May take into consideration the propriety and expediency of revising the present constitution of the commonwealth or making alterations for amendments thereof. Any such revision, alterations or amendments, when made and adopted by the said convention, shall be submitted to the people for their ratification and adoption, in such manner as the convention shall direct; and if ratified and adopted by the people in the manner directed by the convention, the constitution shall be deemed and taken to be revised, altered or amended accordingly; and

if not so revised and adopted the present constitution shall be and remain the constitution of the commonwealth."

No general revision of the constitution was made by the convention, but twenty-two specified amendments were submitted to the people and adopted as separate amendments. Accordingly, by the express terms of the votes in the convention and the last sentence of Article 157 which controls the whole of the document submitted to the people is not a revision, is not an alteration, and is not an amendment. It is specifically designed as a rearrangement merely for the convenience of the reader. The last sentence of Article 157 defines and limits the effect of ratification by the people because that sentence is the controlling sentence expressed by the popular vote.

Before the vote on the question of submitting this rearrangement was taken, on August 12, 1919, the following proceedings took place in the convention (the pages being quoted from the typewritten notes of the debates, now in the office of the Clerk of the Senate).

"Mr. BRYANT of Milton. Mr. President, I am a great deal puzzled, possibly I am the only one that is puzzled, about the meaning of Article 156. . . .

"I do not rise to speak in opposition in any way to the report of the committee, which seems to have been very carefully prepared, and to have involved a very large amount of labor. But after we have adopted this, and after the people have voted on it, what is going to be the Constitution of Massachusetts? Where are we going to find it? Is it in this document? . . .

"In other words, Section 156 says this is the Constitution rearranged, but it must be construed as if it were another document. . . . In my opinion, if hereafter any question arises as to the meaning of the Constitution of Massachusetts the Supreme Court, or any lawyer who is careful, will not take Document No. 2, but will take the old form to construe it, because this document expressly says that this shall not change the existing Constitution of Massachusetts.

"So that I ask again, and I hope the question will be answered for the purpose of the record, at least, after the people have adopted this, where shall we find the Constitution of Massachusetts?"

"Mr. PARKER of Lancaster. To answer most briefly the latter portion of the inquiry of the gentleman from Milton (Mr. Bryant), I should say to him that no one would attempt, as we conceive the significance of this new instrument, to construe it as the Constitution of this Commonwealth without comparing the original text of the Constitution and amendments with the rearranged text. For the purpose of determining the construction the document must be examined in comparison one with the other. It is not, as we conceive it, a substituted Constitution, it is a rearranged Constitution, preserving in its phrase all the provisions which are believed to be now operative. If some that are now operative be not found in the new text they are still existing as the cardinal law of the Commonwealth. To determine what is the constitutional law of Massachusetts it would be necessary for the careful investigator whose opinion was sought as to what was the existing constitutional provision to examine both the rearranged Constitution, which is primarily for the convenience of the observer or whoever cares to examine it to determine its provisions, but for its construction it must be read in association with all the existing texts, both of original constitution and of amendments."

Thereafter the rearrangement was adopted, after a single amendment, and

On motion of Mr. Washburn of Middleborough,—

Ordered, That the committee on Rules and Procedure and the committee on Amendment and Codification of the Constitution, sitting jointly, report to the Convention an order directing the manner in which the proposed rearrangement of the Constitution as duly adopted by the Convention shall be submitted to the people for their ratification and adoption at the state election to be held on November 4 next. (Journal, p. 861.)

On the following day, August 13th

Mr. Washburn of Middleborough, for the committee on Rules and Procedure and the committee on Amendment and Codification of the Constitution, sitting jointly, who were directed to report to the Convention an order directing the manner in which the proposed rearrangement of the Constitution as duly adopted by the Convention shall be submitted to the people for their ratification and adoption at the state election to be held on November 4 next,—reported that the following order ought to be adopted:—

Ordered, That the Rearrangement of the Constitution of the Commonwealth, which has been made and adopted by this Convention, shall be submitted to the people for their ratification and adoption by printing the question hereinafter stated upon the official ballots to be prepared and transmitted by the Secretary of the Commonwealth to all polling places established by law within the Commonwealth for the state election to be held on the fourth day of November next, at which places all persons qualified to vote for state officers may give in their vote by ballot for or against such rearrangement in the following form, to wit:—

“To vote on the following, mark a cross X in the square at the right of Yes or No:

Shall the Rearrangement of the Constitution of the Commonwealth, submitted by the Constitutional Convention, be approved and ratified?”

YES.	
NO.	

And Ordered, further, That the method prescribed by the provisions of Chapter 835, Acts, 1913, as amended by Chapter 109, General Acts, 1917, and by Chapter 364, General Acts, 1919, for the transmission, examination and tabulation of the returns of votes cast on any question submitted by statute shall apply to the transmission, examination and tabulation of the returns of votes cast for and against such rearrangement. If such rearrangement shall appear to be approved by a majority of the qualified voters voting thereon according to the votes returned, examined and tabulated, as herein provided, it

shall be deemed and taken to be ratified and adopted by the people.

The order was considered forthwith. (Journal, p. 866.)

The debates show the following:

Mr. ANDERSON of Newton. Mr. President, I understand that this Document No. 2 is to be engrossed, and I suppose that we ask the people whether they will ratify that engrossed document. I suppose that, even if the Convention should adjourn today, the committee which has charge of that matter would see to the engrossment of this document with anxious care; and yet even though they should examine the engrossed document with anxious care, there finally might be some discrepancy between that document and the engrossed Constitution and engrossed amendments which are now with the Secretary of State. I would like to ask this question of the chairman of the committee, as to whether, if there are such discrepancies in the end, discrepancies in wording or in punctuation which may be important, which of these two documents, the original engrossed copy of the Constitution and amendments or the engrossed copy of the rearrangement, will be the Constitution of the State of Massachusetts?

The PRESIDENT. The question is on the adoption of the order.

The order was adopted.

Later in the same day the Journal (pp. 869-871) shows the following:

Mr. Hart of Cambridge, a member of the special committee on Rearrangement of the Constitution, called attention to the painstaking work of Mr. Morton of Fall River, of that committee, to whom he gave credit for the greater part of the work of rearrangement.

The Convention expressed its appreciation; and Judge Morton responded briefly.

On motion of Mr. Luce of Waltham,—

Ordered, That the sub-committee appointed by the chairman of the special committee on Rearrangement of

the Constitution, namely, James M. Morton of Fall River, Albert E. Pillsbury of Wellesley, Augustus P. Loring of Beverly, Herbert Parker of Lancaster and Albert Bushnell Hart of Cambridge, be and hereby is empowered to correct clerical and typographical errors and establish the text of the rearrangement of the Constitution to be submitted to the people, in conformity with that adopted by the Convention.

The President of the Convention, Hon. John L. Bates, then made his closing address, which is printed in the Journal, in which appears the following passage:

We assembled at this session of 1919 for one distinct purpose. It was that we might submit to the people for their adoption a *rearranged Constitution* containing within its text all that is not at present obsolete of our original Constitution and of the sixty-six amendments that have been passed since 1780. Owing to the efficient and faithful manner in which the special committee on Rearrangement, headed by Mr. Morton of Fall River, and to whom you have just paid such well deserved tribute, has discharged its work, there has been nothing left for you to do but to adopt it practically as it came from the committee and to submit it to the people. This you have done, and in so doing you have rounded out and completed your work.

Mr. Luce of Waltham then moved that the Convention adjourn sine die; and this motion was adopted by a rising vote. Accordingly, at ten minutes before two o'clock, the President declared the Convention adjourned sine die.

CONCLUSION.

On the facts above stated there seems to be no question that both instruments must be printed together as a matter of law hereafter, the rearrangement presumably first, followed by the original and only legally binding instrument with its amendments in their chronological order.

Of course there are not two constitutions of Massachusetts.

We must have hereafter, however, what may appear to the casual reader to be two constitutions but, in order to avoid confusion, it should be clearly understood that only one of these documents has the binding force of the fundamental law and that the other is merely an official text book as described by Mr. Parker in the language above quoted "primarily for the convenience of the observer."

While there is some danger of confusion, the confusion can be avoided if the facts are clearly understood and kept permanently clear in the official publication of the laws so that the courts, the bar, and the public can understand them. It will also help to avoid confusion if in citing the documents the practice is followed of citing first "Const. of 1780 Art. —" or Amendment of 19—" and then in parenthesis "(Rearrangement of 1919 Art. —)." This would resemble the present practice of courts in citing first the original report of a case and then the reference to the same case in some consolidated edition.

F. W. GRINNELL.

Note.

If the conclusion above stated is correct it follows that there is nothing for the Governor to promulgate as anything new in the constitutional sense after the vote at the state election is officially tabulated because the people have done nothing in the sense of constitution making. They have merely directed the future publication of the Rearrangement with the constitution and such direction is not constitution making.

Any future amendments will be amendments to the constitution of 1780 and not to the Rearrangement.

The foregoing article was prepared before the state election of November 4, 1919. Owing to various causes this number of the magazine was not published until after November 4th. The substance of the article in abbreviated form was, however, published in the "Springfield Republican" of November 3, 1919, and the conclusions were called to the attention of the public editorially by the "Boston Herald" of November 1st and the "Boston Transcript" of November 3 prior to the election.

F. W. G.

HAVE MASSACHUSETTS COURTS INHERENT COMMON LAW POWER TO PERMIT SUITS IN FORMA PAUPERIS?—A QUESTION OF CONSTRUCTION UNDER ARTICLE XI OF THE BILL OF RIGHTS.

In chapter five of Mr. Smith's study of "Justice and the Poor," recently published by the Carnegie Foundation (copies of which may be obtained in the manner explained on the inside of the front cover of this number) there is an interesting discussion in regard to the practical effect of the system of costs. As this discussion raises practical questions as to what is or ought to be the law of Massachusetts, substantial extracts are here reprinted as likely to interest the bar.

An interesting note dealing with the same subject from a historical point of view is also reprinted by permission from the "Harvard Law Review." Thereafter a discussion of the Massachusetts law on the subject is added.

EXTRACTS FROM "JUSTICE AND THE POOR," CHAP. 5, PAGES 20-22.

The entire question of the costs and fees paid to courts and court officers is one that has been neglected in discussions concerning the betterment of the administration of justice. While the total expense of litigation and the injustice which it causes is a common topic, the precise part played by the system of imposts fixed and levied by the State on persons who are compelled to resort to the courts for protection or redress has never received any general or extended consideration.

This is perhaps natural, for the present system and tariff of fees is so curious that, with the exception of the taxing clerk and those attorneys who live by costs, few lawyers understand its details or why many of the items exist. And yet, inasmuch as these costs form no inconsiderable item and are a prolific source of denial of justice to the poor, they require careful statement and examination.

Costs have existed so long that there is a general disposition to regard them as fundamental, as immutably bound up with our legal institutions. This is a mistake; costs are not established by our constitutions, they are not the product of

common law, they exist solely and entirely as creatures of statute.¹

The early English law had no system of costs. An unsuccessful plaintiff or defendant might be amerced *pro clamore falso*, that is, the court might impose a fine for setting up a false claim or defence, but it is doubtful if this was done to any extent.² So far as costs played any part, they were included in the damages or, on occasion, assessed in the arbitrary discretion of the judge.³ It is true that it was the royal prerogative of the earlier kings to charge suitors for writs to the King's Court, but it was an accepted maxim that the poor should have their writs for nothing.⁴ "Before the Statute of Gloucester (6 Edward I, cap. 1) no person was entitled to recover any costs of suit either in plea, real, personal, or mixed."⁵

With this statute of Edward I the system of fixed costs begins. The motivating causes which led to the establishment of court fees are not clear. They seem to have been a survival of the idea of revenue, a carrying over of the conception of fines for a false claim (for in theory only the wrongdoer bears costs), and a desire to impose a deterrent to litigation. At the same time, there was a clear idea that, while revenue and a deterrent were desirable, costs ought never to operate as a prohibition, and by the time of Henry VIII ample provision had been made to safeguard the rights of the poor.

The Statute of 11 Henry VII, cap. 12, permitting poor persons to sue without payment of costs merits quotation, for the centuries which have intervened between its enactment in 1495 and the establishment of the small claims court in Cleveland in 1913 bear witness to no more comprehensive attempt to secure freedom of justice to the poor. The tendency has, in fact, until recently been entirely in an opposite direction. It was provided—

"That every poor person or persons which have or hereafter shall have causes of action against any person

¹ 11 Cyclopaedia of Law and Procedure, 24; cases cited.

² 11 Cyclopaedia of Law and Procedure, 24; 17 Fed. 2; 4 Blackstone, 379.

³ John Hullock: *Law of Costs* (London, 1796), 2-4.

⁴ Pollock and Maitland: 1 History of English Law, 174.

⁵ Hullock: *op. cit.*, 2-4; *Society for Comparative Legislation*, vol. 1 (1st Series), 241.

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within this realm shall have by the discretion of the Chancellor of this realm, for the time being, writs or writs original, and subpoenas according to the nature of their causes, therefore nothing paying to your Highness for the seals of the same, nor to any person for the writing of the said writs to be hereafter sued; and that the said Chancellor shall assign clerks to write the same writs ready to be sealed; and also learned counsel and attornies for the same, without any reward taken therefor; and if the said writ or writs be returned before the king in his bench, the justices shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels, nothing taking for the same; and the justices shall likewise appoint attorney for such poor person or persons and all other officers requisite and necessary to be had for the speed of the said suits, which shall do their duties without any reward for their counsels, help and business in the same; and the same law shall be observed of all such suits to be made before the King's justices of his Common place, and barons of his Exchequer, and all other justices in the courts of record where any such suit shall be."

This was the origin of the *in forma pauperis* proceeding.⁶ It is an important landmark which has been too much forgotten. Because it gives effect to the spirit of Magna Carta it has been regarded as establishing a constitutional principle.⁷ This enactment was carried to its logical completion by 23 Henry VIII, cap. 15, which freed a pauper plaintiff from imposition of costs if he failed to obtain a verdict or was nonsuited. The statute left the defeated poor suitor to be subjected to such other punishment as the judges deemed reasonable. The old books state that if a pauper abused the proceeding or was nonsuited, he might be taken to the marketplace and whipped;⁸ but the general spirit of the law was such that when a motion came before Lord Chief Justice Holt

⁶ 16 *Encyclopedia of Pleading and Practice*, 675; *Roy v. Louisville & Nashville Ry. Co.*, 34 Fed. 276.

⁷ Frederick J. Stimson in *Federal and State Constitutions* (1908) lists this statute in his historical digest of constitutional principles, Book II, chap. II, p. 100.

⁸ *Bacon's Abridgment*, vol. II, tit. Costs, § 4, p. 51

to order a nonsuited pauper to be whipped, he denied the motion, observing that there was no officer for the purpose and that he had never known it done.⁹

These statutes remained in force in England until 1883, when by the Statute Law and Civil Procedure Act (46 & 47 Victoria, c. 49) they were repealed and, with them, these rights and privileges swept away.¹⁰ The English law remained inhospitable to poor suitors until the great changes inaugurated in 1913.¹¹

The American states carried over into their judicial systems the plan of costs and fees, but many neglected to include the necessary corollary of the proceeding in forma pauperis. In Pennsylvania it has been held that the statute of 11 Henry VII, c. 12, is part of the common law of the state,¹² but in practice the statute is ignored. Today, the permission to sue without costs is granted by statute in about half the states. Even in such states the right is a good deal hedged about, by limiting it to specified types of cases, as wage claims, by confining it to proceedings in certain courts,¹³ and by holding it inapplicable to cases on appeal.¹⁴ In several states it has fallen into disuse.

Certain it is that until thoroughgoing changes are made, denial of justice to the poor because of inability to pay the required court costs and fees will continue. That the present system of costs works daily to close the doors of the courts to the poor is proved by ample evidence. In Boston the Legal Aid Society has kept precise figures since April 1, 1916. During the seventeen months ending August 31, 1917, there were 551 cases which could not be settled out of court, which were meritorious and required court action; 386 were taken to

⁹ Salk. 506; Bacon, *op. cit.*; Hullock: *Law of Costs*, page 213.

¹⁰ Bisschop: *Legal Aid for the Poor*, 48 Law Journal (1913), 242; Bentwick: *Legal Aid for the Poor*, 47 Law Journal (1912), 48.

¹¹ These are discussed *post* in Chapter XIV, Assigned Counsel, page 102; and in Chapter XXV, A More Equal Administration of Justice, page 248.

¹² *Cowan v. City of Chester*, 2 Delaware County R. 234; 7 Weekly Notes of Cases, 31; *Roberts' Digest* (second edition, Philadelphia, 1847), 116; 1 Johnson on Practice in Pennsylvania, 71.

¹³ In Maryland the in forma pauperis act does not apply to the People's Court in Baltimore; in New Jersey it does not apply to the District Courts.

¹⁴ 16 Encyc. Pleading and Practice, 693. It seems to apply to appeals only in the Federal Courts and in Georgia. *Fite v. Black*, 85 Ga. 413; in North Carolina, *Mason v. Osgood*, 71 N. Car. 212; and in Tennessee, *Lynn v. Mfg. Co.*, 8 Lea, 29.

court and won, 36 were taken and lost, and 129 could not be brought before the courts because of the client's inability to pay the costs. In other words, the fees required by the state caused a total failure of justice to twenty-three per cent of the persons who needed to invoke the aid of the machinery of justice.

An epoch-making decision by the Supreme Court of California, rendered in 1917,¹⁶ lends judicial sanction to the ideas expressed in this chapter. The case is striking. It will be recalled that jury fees in California are twenty-four dollars a day, to be paid in advance. A day laborer, the father of ten minor children all wholly dependent on him for support, desired to bring suit in the Superior Court for the wrongful killing of his daughter and claimed his right to a jury trial. He filed an affidavit that he did not have more than twenty-five dollars and asked leave to sue *in forma pauperis*. There is a local statute permitting such a proceeding before a justice of the peace, but none making provision for suits in the courts of record. The Superior Court refused the application.

The attorney for the San Francisco Legal Aid Society intervened as *amicus curiae*, and the case was appealed.¹⁷ The Supreme Court held that the *in forma pauperis* proceeding was a part of the English common law, which had become part of the American common law, and that the court had inherent power to grant leave to sue without costs so that justice might not be denied to the poor.

Parts of this decision, which is the first ever to translate into action the fundamental constitutional principles of freedom and equality of justice, express the situation so clearly that it is difficult to understand why the majority of courts have always been blind to it.¹⁸

"Imperfect as was the ancient common law system, harsh as it was in many of its methods and measures, it

¹⁶ *Martin v. Superior Court of Alameda County*, 54 California Decisions, No. 2874 (October 19, 1917), p. 422.

¹⁷ Cf. 1 San Francisco L. A. R. 9.

¹⁸ See the excellent note in 31 Harvard L. Rev. (January, 1918), 485-487. For a recent decision holding that the requirement of costs is not in contravention of equal protection of the laws, see *In re Lee*, 168 Pac. 63. In a comment on this case it is well pointed out that the rule would be tenable if the costs statute provided for *in forma pauperis* proceedings. 16 Michigan L. Rev. 192.

would strike one with surprise to be credibly informed that the common law courts of England shut their doors upon all poor suitors who could not pay fees, until Parliament came to their relief. Even greater would be the reproach to the system of jurisprudence of the state of California if it could be truly declared that in this twentieth century, by its codes and statutes, it had said the same thing. . . ."

"Again we say that it would be an unmerited reproach cast upon the legislative branch of our state government to hold that it . . . designed to forbid such a poor suitor from prosecuting his action according to the laws of the land in a court of record, when rights might and could be all-important and his recovery of the utmost consequences."

Costs have their place as a deterrent, but they should serve to discourage, not all litigation, but false litigation, specious pleas, vexatious proceedings taken for delay, and to insure prompt compliance with court orders. The system of costs in equity approaches this plan, and in England the use of costs for such purposes is established.¹⁹

Costs, like delay, present in the main no fundamental or inherent difficulty. A reduction of costs and provision for in forma pauperis proceedings can easily be effected. It is a question of the will to do it.

PROCEEDINGS IN FORMA PAUPERIS.

(*Reprinted by permission from 31 Har. Law Rev. 485.*)

"The California Political Code (Sec. 4469) makes the common law of England, so far as not inconsistent with the constitution and laws of the state, the rule of decision in all courts. Under the well-settled construction of that provision in other states, English statutes prior to colonization and such English statutes subsequent to colonization, as were received as common law in this country prior to the Revolution, are included in the term 'common law' of England (*Patterson v. Winn*, 5 Pet. 233; *Spaulding v. Chicago R. Co.*, 30 Wis. 110; *Kreitz v. Behrensmeyer*, 149 Ill. 496). Hence the statutes

¹⁹ See American Judicature Society, *Bulletin XI*, pages 102-107; *Ibid.*, *Bulletin VI*, page 67.

of Henry VII and Henry VIII (11 Hen. VII, c. 12; 23 Hen. VIII, c. 15) as to proceedings *in forma pauperis* would be common law in this country so far as applicable. The former, entitled 'A Mean to help and speed Poor Persons in their Suits,' provided that the pauper should have writs, subpoenas, counsel and other requisite officers without fee; the latter excused the defeated pauper from paying costs, but provided that the court in its discretion might punish him. It is doubtful whether this meant more than he was to be punished in the discretion of the court if, having sued *in forma pauperis*, he did not go on and prosecute his action, since his conduct would amount to a fraud on the court, that is, to a contempt. But there are seventeenth-century statements that, where a pauper was non-suited, costs should be taxed and the option given him of discharging them or submitting to be whipped (Munford v. Pait, 1 Sid. 261; Anonymous, 2 Salk. 507; Anonymous, 7 Mod. 115). Blackstone says the latter practice was disused in his time (3 Blackstone, Com. 400), and according to Tidd this punishment does not appear ever to have been inflicted (1 Tidd, Practice, 8 ed., 93). As early as 1697, Lord Holt in denying a motion that a non-suited pauper be whipped for failure to pay costs said that he had never known it to be done, observing that the court had no officer to whip the pauper (Anonymous, 2 Salk. 507). Even if the power to permit such proceedings rested simply on the statutes cited, and those statutes called for whipping of the non-suited pauper, it would seem that the inapplicable part could be rejected exactly as in case of common-law doctrines of judicial origin. (Van Ness v. Pacard, 2 Pet. 137). As the election to be whipped is at most a judicial gloss resting on a statement made to the court in a case in the reign of Charles II as to what had been the usual practice (Munford v. Pait, 2 Sid. 261: 'Et sur inquiry del practice in tiel case fuit certifie que le usual voy est par taper costs & si le cost ne soit pay que le plaintiff sera whip'), this gloss might obviously be rejected as inapplicable, the more as English decisions and English writers had pronounced it obsolete prior to the Revolution.

The right to sue *in forma pauperis* was doubtless an indulgence arising out of the humanity of the judges, and, indeed, the English courts are agreed that it existed at common law

apart from statute, and that the statutes were simply regulatory.* These decisions although rendered since the Revolution may well be taken to establish the common law for our purposes (*Chilcott v. Hart*, 23 Colo. 40; *Williams v. Miles*, 68 Neb. 463. See Pope, 'English Common Law in the United States,' 24 Harv. L. Rev. 6). Hence those courts (*Hoey v. McCarthy*, 124 Ind. 466; *Campbell v. Chicago R. Co.* 23 Wis. 490) which hold that proceedings *in forma pauperis* can be had only where authorized by state statute would seem to be in error, and the California Court (*Martin v. Superior Court*, San Francisco Recorder, October 18, 1917), correct in its decision that such proceedings are inherent in common-law courts of record, and exist unless expressly taken away by statute. That the California Code of Civil Procedure (Sec. 91) specifically provides that in justices' courts payment of certain costs in advance shall not be required of paupers is no argument that the legislature intended thereby to restrict courts of record in their common-law power. Justices' courts are dependent upon the legislature for their authority, and such a provision is nothing more than conferring upon them in part that which belongs inherently to courts of record.

It is suggested in the opinion of the California Court that as the section of the Political Code was adopted in 1850, general acts of Parliament in amendment or improvement of the common law up to that date may be common law in California. A similar argument was made in *Williams v. Miles* (68 Neb. 463, 470) and rejected by the court. In the present case the suggestion is a mere *dictum* and is disclaimed by two of the justices in a concurring opinion."

FURTHER DISCUSSION.

In the light of these discussions the question arises whether the Massachusetts Courts have inherent power at common law to allow litigation to be conducted without payment of costs

* *Brunt v. Wardle*, 3 Man. & G. 534, 542, and the cases cited therein. Cf. Y.B. 15 EDW. IV. 26b (1476): "Note that at the beginning of this term, one John Brown was present to be the presignator for the poor in the Common Pleas and . . . it was said that . . . if any poor man would swear to him that he was not able to pay for the entry of the pleas in the rolls then he ought to enter the pleas without taking anything for his labor, *quod nota*, and this was done by the advice of the justices."

in their discretion in proper cases upon proof of inability to pay costs.

"This inquiry" apparently "has never before been expressly presented for consideration and determination in this Commonwealth" but, in the language of Shaw, C. J. (in *Washburn v. Phillips*, 2 Met. 296, 7) reaffirmed by Rugg, J., in *Crocker v. Justices of the Superior Court*, 208 Mass. at p. 165, 6, "this, so far from affording a reason why it should not be fully examined, rather requires that it should be considered with great care and attention."

The established method of ascertaining the common-law powers of Massachusetts Courts is that explained by Rugg, J., in the Crocker Case, above cited, as follows:

"We resort to a consideration of the common law of England previous to the grant of the Provincial Charter in 1691 because as was said in *Commonwealth v. Knowlton*, 2 Mass. 530 at 534, 535, 'Our ancestors . . . claimed the common law as their birthright and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law thus claimed, was the common law of their native country as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never re-enacted in this country but were considered as incorporated into the common law,' and 'in order to ascertain what was the common law then and before the Revolution, it is profitable and permissible to examine decisions of English Courts since that date, not as binding authorities, but as strongly persuasive of what the common law was.'"

Now as pointed out in the note above quoted from the Harvard Law Review the inherent power of the courts in England "existed at common law apart from statute" and statutes in the reigns of the Tudor Kings above quoted "were simply regulatory." This conclusion seems the only one consistent with the well-known extract from Magna Carta, cap. 40, "To no one will we sell, to no one will we refuse or delay, right or justice."

Accordingly the substance of this common-law power to protect poor litigants was unquestionably among the powers inherited by Massachusetts Courts and seem to exist today unless something has happened to repeal or alter it. There

appears nothing of this kind except disuse and a lack of practical appreciation of the meaning of Article XI. of the Massachusetts Bill of Rights.

Section 1 of Chapter 203 of the Revised Laws provides that "In civil actions the prevailing party shall recover his costs, except as otherwise provided." Chapter 204 of the Revised Laws provides the fees that must be paid in order to bring an action in the various courts. These or similar general statutes as to fees and costs have been in force practically ever since the constitution was adopted and they appear to have been understood as repealing, or not recognizing, the common-law power of the courts to excuse poor persons from fees and costs in proper cases where justice demands it. But the legal effect of the eleventh article of the Bill of Rights has been overlooked in this connection.

That article reads:

"Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly and without delay; conformably to the laws."

Mr. Smith raises some very practical questions under this article and refers to it effectively in a more or less hortatory sense but the legal effect of it may be still more emphasized in connection with this question of this discretionary power of the courts as to costs and the interpretation of the general statutes above referred to requiring payment of fees and costs in all cases.

I submit that those statutes *must* be construed as subject to the common-law power of the courts to excuse poor persons from their payment if justice requires it because the legislature has no power under the constitutional provision above quoted to interfere with the court's exercise of its primary function of administering justice in this respect. The mere general terms of the statutes are certainly not sufficient ground for attributing to the legislature any such intention to interfere in such a way.

Accordingly, I submit that the Massachusetts Courts have the inherent common-law powers to protect poor litigants in

the matter of fees and costs in proper cases and that this power has been preserved by Article XI. of the Bill of Rights.

The Crocker case above cited (208 Mass. 162) seems to be on all fours with this case in all essential considerations bearing on the inherent common-law powers of Massachusetts courts. In that case, the court decided in 1911, after the first thorough consideration which appears to have been given to the question since the constitution was adopted in 1780, that the court had power to order that an indictment found in one county should be tried in another if the court was satisfied that the interests of justice required such an order. This decision was reached in spite of various dicta to the contrary in earlier cases and after a careful examination of the common-law powers inherited by Massachusetts courts and of the practical meaning of various provisions in the Bill of Rights as bearing upon the existence of these powers.

The reasoning of Rugg, J., in that case, especially on pages 178-179 seems to be conclusive in support of the power to permit suits in forma pauperis when the interests of justice really demand it. The reasoning on these pages has to do solely with fundamental principles involved in the administration of justice, and it seems a complete answer to all arguments which might be based upon any occasional dicta or upon long continued disuse of a particular power owing to a failure to realize the practical importance of its exercise in carrying out the purpose for which courts are instituted.

IF THE EXERCISE OF THE POWER IS TO BE REGULATED IT SEEMS
TO BE WITHIN THE RULE-MAKING POWER OF THE
COURTS.

If this conclusion is sound, no legislation appears to be necessary to authorize the courts to exercise their power. It seems to be a matter within the rule-making power of the various courts, under Section 3 of Chapter 158, which provides as follows:

"The courts shall respectively from time to time make and promulgate uniform codes of rules, not inconsistent with law, for regulating the practice and conducting the business of such courts in cases not expressly provided for by law; for the purposes" among others of,

“Remedying abuses and imperfections in practice and diminishing costs.”

This provision of Chapter 158 relates to the Supreme Judicial Court and the Superior Court.

Section 45 of Chapter 160 provides that the lower courts may make rules “regulating the practice and manner of conducting business in cases which are not expressly provided for by law, and shall submit a copy thereof to the Superior Court or a justice thereof for approval, amendment, or alteration.”

Under these broad general rule-making powers, it seems to be possible for the courts to deal with this matter by rule without any further legislation whatever, if a rule is necessary, although it is doubtful whether any rule even is necessary to allow any justice to exercise the common-law powers above referred to in the performance of his duty to administer justice. The regulation of the matter by general rule of court as a guide for uniform administration may, however, be desirable. The common-law principle involved seems to cover not merely the ordinary costs and filing fees in the lower courts but the ordinary expenses of printing the record on appeals or exceptions and the necessity of printing briefs in the Supreme Judicial Court.

While I do not mean to suggest that this power should be indiscriminately exercised, yet, if there is a case pending which involves a question of law as to which there is a serious doubt and the party who wishes to appeal and present the question is actually not in a position to do so for lack of funds, it seems that there should be an opportunity provided by the court so that the original papers and a typewritten or manuscript brief might be filed before the full bench if necessary where the court is satisfied on motion that justice requires such an exception to the general rule. There is no reason to expect any excessive number of such applications. The whole matter would be within the full control of the court. These suggestions are submitted for the consideration of the court and of the bar in connection with the problems which have been suddenly brought before us with so much emphasis by the recent publication of Mr. Smith's book.

F. W. GRINNELL.

DOES THE FEDERAL ESTATE TAX TAKE PRECEDENCE OVER STATE INHERITANCE TAXES SO AS TO REQUIRE A DEDUCTION OF THE FEDERAL TAX IN FIGURING THE STATE TAXES ON THE RESIDUE?—A FEDERAL QUESTION OF NATIONAL IMPORTANCE RAISED BY NEW YORK PRACTICE.

In the May number of this magazine (page 259) the question whether the federal estate tax of 1916-17 and the Massachusetts inheritance tax could be mutually deducted was discussed, and the opinion of Judge Holmes, while he was chief justice of Massachusetts, in the case of *Hooper v. Shaw*, 176 Mass. 190, was referred to.

In that case, which arose under the federal inheritance tax of 1898, Chief Justice Holmes said:

"The question is not one of precedence between the commonwealth and the United States . . . it is in substance one of justice and in form one of construction."

As pointed out in that case, it was the practice of the federal authorities under the Act of 1898 to deduct the state inheritance taxes and under the decision in *Hooper v. Shaw* it was decided that the federal inheritance tax should be deducted in figuring state taxes so that the taxes were mutually deductible. On the other hand, New York, the Court of Appeals in an opinion by Cullen, C. J., in the *Gihon* case (169 N.Y. 443), decided that the federal tax of 1898 could not be deducted in figuring the New York transfer tax, the ground being that they were both taxes on the inheritance and that in legal theory the legatees received the money before the tax attached to it and, therefore, both taxes operated on the whole inheritance, and that the New York statute made no allowance for deducting the federal tax.

This opinion was followed and the reasoning in it was applied to the federal estate tax of 1916 by the Appellate

Division in the Sherman Case (179 N.Y. App. Div. 497 at p. 503). In that opinion, Judge Lyon said:

"If the Federal Government may impose an inheritance tax which is entitled to be deducted from the estate prior to the assessment of the state transfer tax it has interfered with such conditions, and has diminished the amount which the State has appropriated as a condition of the transfer being had, by the percentage upon the sum appropriated by the Federal Government. The State transfer tax will thus have become one not upon the whole estate transmitted but one upon the whole estate less the amount of the Federal tax. This lessening of the transfer tax while not large in the case at bar would aggregate a very considerable sum when applied to all the estates subject to tax within the state. The constitutionality of a Federal Act entitled to such a construction and effect might well be doubted."

The court then held that the Federal Estate tax of 1916 could not be deducted before assessing the state transfer tax. This was a three to two decision, Kellog, P. J., and Woodward, J., dissenting. This decision was affirmed *without discussion* by the Court of Appeals in 222 N.Y. 540.

The federal question of precedence referred to by Chief Justice Holmes in the case already mentioned is raised, therefore, by this New York decision and it is a federal question of national interest and importance.

The decision in the Sherman Case, which was made by the Court of Appeals without discussion or opinion of any kind, does not seem to fit with the language of the opinion delivered last May by the same court in the Hamlin Case (226 N.Y. 407) in which the unanimous Court of Appeals, speaking through Mr. Justice Hogan, decided that the federal estate tax was not apportionable among the various legatees in the absence of any special directions in the will, but was payable entirely out of the residue. Judge Hogan said:

"To hold that the congress by the language of the sections referred to intended by implication to provide that the tax imposed by the act was one upon legacies, the tax to be paid by legatees, would not only violate

the clearly expressed intention of the congress, but require us to ignore the historical facts surrounding consideration of the measure by the congress."

He further said:

"The conclusion is inevitable that the tax was not imposed on legacies, the tax to be paid by the legatees, rather than by the executor out of the estate before distribution."

The New York Court, therefore, while stating that the federal tax is not a tax on the transfer to any legatees, but is a tax on the transfer from the deceased to the executor or administrator to be paid by him *before distribution*, still refuses to allow the deduction of the tax although the language of the court in the Hamlin Case seems to undermine the reasoning of the earlier cases.

That a question of precedence might arise was recognized by Judge Lyon in the passage above quoted from the Sherman Case, but he dismissed it with a doubt as to the constitutional power of congress to take precedence.

I have not seen yet any thorough discussion of this question in opinions dealing with the federal estate tax, and I submit the following suggestions for the purpose of provoking discussion at the bar.

The New York courts seem to treat the federal estate tax as if it stood on the same footing legally as transfer taxes of other states which are foreign jurisdictions as far as New York is concerned. The fact seems to be overlooked that the estate tax imposed by congress is not a tax by a foreign jurisdiction as far as any state is concerned. It is imposed under the Constitution of the United States which is the "Supreme law of the land" applying directly in every state. The constitutional power of congress to impose this estate tax seems to be conceded by the New York Court of Appeals in the opinion of Judge Hogan in the Hamlin Case above referred to, for he said at the end of the opinion:

"I have not deemed it necessary to refer to the power of the Congress to enact the law under consideration.

To one interested in such question the careful and exhaustive opinion of Mr. Justice White in the Knowlton case will be of interest. As to the equity of requiring payment of the tax by the residuary legatees and relieving the specific legatees from any contribution to the same, the question is susceptible of opinion. The Congress has spoken and it is our function to interpret, not to legislate."

In the case of *Plunkett v. Old Colony Trust Company*, 124 N.E. Rep. 265, the Massachusetts Court, in an opinion by Chief Justice Rugg, has reached the same conclusion as that of the New York Court in the Hamlin case in deciding that the tax must be paid out of the residue *before distribution and is not to be apportioned* among the various legacies, in the absence of directions in the will for that purpose. The court said:

"The tax here in question is an estate and not a legacy or succession tax. . . . The further step follows inevitably . . . that the law makes no provision for apportionment of the tax among legatees but leaves it simply to be paid out of the estate before distribution is made. . . . The tax is a pecuniary burden or imposition laid upon the estate. . . . In its nature it is superior to the claims of the residuary legatee. Since neither the Act of Congress nor the will and codicils make any other provision for the point of ultimate incidence of this tax, it must rest on the residue of the estate."

This reasoning seems sound. Following this statement and applying the rule stated by Chief Justice Holmes in the case of *Hooper v. Shaw*, that in dealing with taxation statutes "when it is possible to interpret them to mean what is just, we must do so," I understand that the Massachusetts taxing authorities do deduct the federal estate tax before figuring the Massachusetts inheritance tax on the residuary shares. In so doing, they seem to act in accordance with the dictates of justice, while the present New York practice, under the *Sherman Case*, seems to be extraordinarily unjust.

I do not believe that there is any sound basis for interpreting the various state statutes in such a way as to prevent a deduction of such a tax imposed by the national government for the purpose of meeting the war necessities of the nation and other national demand.

I think that the action of congress which operates as already stated, not as the act of a foreign jurisdiction, but as the "Supreme law of the land," operating directly in New York under the Constitution of the United States, provides a blanket charge on the estate in the exercise of the federal taxing power which does take precedence of the state taxing power to the extent of requiring a deduction of the amount of the estate tax. While the liability for both taxes attaches simultaneously at the date of the death, yet, the relative nature of the two taxes, arising out of the relative nature of the state and the federal governments, is such that the power of congress necessarily takes precedence within the field of the powers delegated to it.

Without intending to strain the illustration, the relative nature of the powers of congress over interstate commerce and over bankruptcy is worth considering. A national bankruptcy act supersedes state insolvency acts although those acts still remain in force so that they revive in case of the repeal of a national act. State acts are superseded because the facts make it impossible for them both to operate at once.

In the case of the national and state power to impose excise taxes on the privilege of transfer by death, there is a somewhat similar situation where two acts operate simultaneously in the same jurisdiction with equal force.

In some opinions, it is suggested that in legal theory the full amount of the residue after the payment of the other legacies and the so-called "Expenses of Administration" goes to the residuary legatees and is then taxed and that the tax must be considered legally as paid after the transfer to them and out of the amount thus transferred.

This is a purely artificial theory which I submit is not justified by the facts and, however much it may be used as a basis for sustaining the results in the Gihon case (which was not, by the way, followed by other states such as Massachusetts), this theory cannot be invoked to sustain the same rule in regard to the present federal estate tax which is now

decided by the New York Court to be a blanket charge payable out of the residue.

It cannot be said on any theory that the entire estate goes to the residuary legatees and that the tax is imposed by the federal government upon them. The entire estate does not go to them under any circumstances, either in fact or in theory. The property specifically devised goes directly to the specific devisees. The property given in specific legacies goes directly first to the executor or administrator and through him to the specific legatees, and none of the property thus disposed of goes directly or indirectly to the residuary legatees.

The only persons to whom a direct relation to all the property of the estate is transferred are the executors or administrators and, even as to them, in the case of real estate specifically devised, their relation is limited and usually conditioned on a deficiency in the personal estate to meet liabilities or by the terms of a power of sale, etc.

But the federal tax is measured by the entire property after certain specified exemptions, etc., are taken into consideration. No theory, therefore, can call it a tax on the residuary gift.

It would be more properly described as a tax on the transfer to the executors or administrators of their relation to the entire estate a tax which they are charged with meeting before any of the estate is passed on to any of the beneficiaries. There is no one but the executors or administrators who has any relation whatever to the "transfer of the net estate," except the deceased, himself. The "net estate" is never transferred under any condition under the act of congress, except to the executor or administrator for the purpose of settle. In other words the tax is on the transfer of property *from the deceased by his death rather than on the transfer to anyone.*

These being the facts, as to which I can see no ground for dispute, it seems to show, from the relation of the state and federal government under the Constitution of the United States, that the act of congress operates simultaneously with the state transfer tax act, yet, it operates in such a way as to change the nature of the thing upon which the state statute can act and as nothing is ever transferred beyond the executors or administrators, even in legal theory under the

act of congress until the federal tax is taken care of, there is nothing on which the state statute taxing the amount of the property transferred to the residuary legatees can operate, except what is left after the deduction of the federal estate tax thus imposed.

This point of view never seems to have been discussed fully in any of the opinions of the New York Court of Appeals which have been called to my attention thus far. It is to be hoped that the whole subject will be reconsidered.

F. W. GRINNELL.

Note.

If the New York transfer tax be regarded, as some of the language in the Gihon and Sherman cases indicate, as a tax on the transfer *from the deceased measured by the amounts going to the several transferees*, this does not affect the argument on precedence at all. The question still is whether the "supreme law of the land" does not require a construction of a state statute which shall recognize facts created by it.

F. W. G.

WHAT IS THE SOUND INTERPRETATION OF
ARTICLE V. OF THE FEDERAL CONSTITUTION
AS TO AMENDMENTS?

CAN A RATIFICATION BY A STATE LEGISLATURE BE REVOKED?
IS IT SUBJECT TO REFERENDUM? CAN A SUBMISSION OF
AN AMENDMENT BE REVOKED BY CONGRESS?

ADVISORY OPINION OF THE JUSTICES OF THE SUPREME JUDICIAL
COURT OF MAINE.

(107 Atlantic Reporter 673.)

To the Honorable Carl E. Milliken, Governor of Maine:

The undersigned, Justices of the Supreme Judicial Court, having considered the questions propounded by you under date of July 9, 1919, relating to the ratification of the Eighteenth Amendment to the Constitution of the United States and the necessity of submitting by referendum the ratifying resolve of the Legislature to the qualified voters of the state, respectfully submit the following answer:

The request for our opinion is accompanied by a statement of facts, from which it appears that the Sixty-Fifth Congress of the United States on December 3, 1917, adopted a joint resolution proposing an amendment to the Constitution of the United States, which amendment provides that after one year from the ratification thereof the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is thereby prohibited

This amendment, thus adopted by joint resolution of Congress, was proposed to the Legislature of Maine of 1919 for ratification, and was ratified by a joint resolve of the Senate and House of Representatives; the concluding paragraph, after reciting all the preliminary steps, being of the following tenor:

"Therefore resolved that the Legislature of the state of Maine hereby ratifies and adopts this proposed amendment to the Constitution of the United States. And that the secretary of state of the state of Maine notify the Secretary of State of the United States of this action of the Legislature by forwarding to him an authenticated copy of this resolve."

Petitions apparently bearing the requisite number of signatures having been seasonably filed with the secretary of state, requesting that this resolve be referred to the people under Amendment 31 of article 4 of the Constitution of Maine, known as the initiative and referendum amendment, the question is now asked of the Justices whether this joint resolve of the Legislature of Maine, ratifying an amendment to the federal Constitution, proposed by and duly submitted for ratification by the Congress of the United States, is subject to the provisions of Amendment 31, and therefore must be referred to the people under the facts existing in this case.

Answer.

This question we answer in the negative. In our opinion this resolve does not come within the provisions of the initiative and referendum amendment, and cannot be referred to the people for adoption or rejection by them. The ratification of the proposed amendment to the Constitution of the United States was complete, final, and conclusive, so far as the state of Maine was concerned, when the Legislature passed this resolve.

[1] Our reasons are as follows: The subject-matter of the action of the Legislature under consideration is a proposed amendment to the Constitution of the United States, the proposal and ratification of which are wholly governed by the provisions of that Constitution. Those provisions are clear and explicit. They are as follows:

“Art. 5. The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislature of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode may be proposed by the Congress. * * *”

This article was a part of the original Constitution of 1789, and has remained unchanged to the present day.

It will be observed that there are two distinct stages in the process, the proposal and the ratification. The proposal may originate in either of two ways:

First, from Congress, by joint resolution, whenever two-thirds of both Houses deem it necessary.

Second, from the states, whenever two-thirds of the Legislatures of the several states may request that a national constitutional convention be called for that purpose, in which case Congress must call such a convention.

[2, 3] All the federal amendments which have thus far been adopted have been proposed in compliance with the first method; that is, by a joint resolution of the two Houses of Congress. No national constitutional convention has ever been called or held. Such proposed amendment is a matter within the sole control of the two houses, and is independent of all executive action. The signature of the President is not necessary, and it need not be presented to him for approval or veto. *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. Ed. 644; *State v. Dahl*, 6 N. D. 81, 68 N. W. 418, 34 L. R. A. 97. Nor is Congress, in proposing constitutional amendments, strictly speaking, acting in the exercise of ordinary legislative power. It is acting in behalf of and as the representative of the people of the United States under the power expressly conferred by article 5, before quoted. The people, through their Constitution, might have designated some other body than the two houses or a national constitutional convention as the source of proposals. They might have given such power to the President, or to the Cabinet, or reserved it in themselves; but they expressly delegated it to Congress or to a constitutional convention.

As there are two methods of proposal, so there are two methods of ratification. Whether an amendment is proposed by joint resolution or by a national constitutional convention, it must be ratified in one of two ways:

First, by the Legislatures of three-fourths of the several states; or

Second, by constitutional conventions held in three-fourths thereof, and Congress is given the power to prescribe which mode of ratification shall be followed.

Hitherto Congress has prescribed only the former method, and all amendments heretofore adopted have been ratified solely by the approving action of the Legislature in three-fourths of the states. That is the mode of ratification prescribed by Congress in case of the amendment now under con-

sideration, and it was in pursuance of that prescribed mode that this ratifying resolve was passed by the Legislature of Maine.

[4] Here, again, the state Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by article 5. The people, through their Constitution, might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves, but conferred it completely upon the two houses of the Legislature; that is, the Legislative Assembly.

[5] It is a familiar, but none the less fundamental, principle of constitutional law that the Constitution of the United States is a compact made by the people of the United States to govern themselves as to general objects in a certain manner, and this organic law was ordained and established, not by the states in their sovereign capacity, but by the people of the United States. The preamble, "We, the people," so states, and such is the fact. *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440. It is equally well settled that it was competent for the people to invest the federal government, through the Constitution, with all the powers which they might deem necessary or proper, and to make those powers, so far as conferred, supreme, to prohibit the states from exercising any powers incompatible with the objects of the general compact, and to reserve in themselves those sovereign authorities which they did not choose to delegate either to federal or state government. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 4 L. Ed. 97. Whether a certain power has been conferred either expressly or by reasonable implication upon the national government, or has been reserved to the states or to the people themselves, must depend upon the construction of the language of the Constitution governing that particular subject-matter.

[6] It admits of no doubt that in the matter of amendment which is governed by article 5, the people divested themselves of all authority and conferred the power of proposal upon Congress or upon a national constitutional convention, and the power of ratification upon the state Legislature or upon state constitutional conventions.

This view has the sanction, not only of reason, but of authority. Mr. Iredell, in the North Carolina convention which ratified the federal Constitution, in discussing this ratifying clause, said:

"By referring this business to the Legislatures, expense would be saved, and in general, it may be presumed, they would speak the general sense of the people. It may, however, on some occasions be better to consult an immediate delegation for that purpose. This is therefore left discretionary." 4 Elliott, Deb. 176, 177.

This discretion, under the terms of article 5, is to be exercised by Congress.

In *Dodge v. Woolsey*, 18 How. 331, 348 (15 L. Ed. 401), the Supreme Court of the United States, in emphasizing the supremacy of the Constitution, said:

"It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States, when two-thirds of both houses shall propose them, or when the Legislatures of two-thirds of the several states shall call a convention for proposing amendments, which, in either case, become valid, to all intents and purposes, as a part of the Constitution, when ratified by the Legislatures of three-fourths of the several states, or by convention in three-fourths of them, as one or the other mode of ratification may be proposed by Congress. * * * Now, whether such a supremacy of the Constitution, with its limitations in the particulars just mentioned, and with the further restriction laid by the people upon themselves, and for themselves, as to the modes of amendment, be right or wrong politically, no one can deny that the Constitution is supreme, as has been stated, and that the statement is in exact conformity with it."

A well-known writer on Constitutional Law, after tracing the history and the scope of article 5, concludes as follows:

"Whether an amendment is proposed by Congress or by a convention, it is ratified or rejected by the representatives of the people either in Legislature or in convention, and not by the people voting on it directly. The people have no direct power either to propose an amendment or to ratify it after it is proposed and submitted." Watson, Const. vol. 2, p. 1310.

It is interesting to note in this connection, as an historical fact demonstrating the attitude of the federal government, that according to their admitted and accepted practice if a state Legislature has once ratified a federal amendment a subsequent Legislature has no power to rescind such ratification. Such rescission was attempted by Ohio and New Jersey with reference to the Fourteenth Amendment, and by New York with reference to the Fifteenth; but the proclamation of the Secretary of State for the United States was issued, announcing the final adoption of the amendments as a part of the federal Constitution, notwithstanding the attempted rescission by subsequent Legislatures. The attempted rescission was ignored. Watson, Const. vol. 2, p. 1315.

If a subsequent Legislature cannot rescind the ratification by a former Legislature, it would seem that much less could such ratification be rescinded by the subsequent vote of the people, especially in view of the fact that the people have unreservedly surrendered all authority over that subject-matter.

It follows, from what has been said, that even if the people of Maine, by adopting in 1908 the initiative and referendum amendment of our state Constitution, had attempted to assume or regain the power of ratification of proposed amendments to the federal Constitution, by exercising a supervisory authority over the state Legislature in that respect, such attempt would have been futile. Their power over amendments had been completely and unreservedly lodged with the bodies designated by article 5, and so long as that article remains unmodified they have no power left in themselves either to propose or to ratify federal amendments. The authority is elsewhere.

[7] But the people, by the adoption of the initiative and

referendum amendment, did not intend to assume or regain such power.

The purpose and scope of that amendment were fully considered and discussed in the case of *Moulton v. Scully*, 111 Me. 428, 446, 89 Atl. 944, and it was there held that the design of the initiative and referendum was to make the law-making power of the Legislature, not final, but subject to the will of the people, and to confer that power in the last analysis upon the people themselves. And the court adds:

"This, too, marks the limitation of the amendment. It applies only to legislation, to the making of laws, whether it be a public act, a private act, or a resolve having the force of law. This is shown clearly and conclusively by the language of section 2 of part third of article IV, under the general head of 'Legislative Power.' 'Every bill or resolution having the force of law to which the concurrence of both houses may be necessary, * * * which shall have passed both houses, shall be presented to the Governor, and if he approve, he shall sign it,' etc. The referendum applies, and was intended to apply, only to acts or resolves of this class, to 'every bill or resolution having the force of law,' that is, to what are commonly known as legislative acts and resolves, which are passed by both branches, are usually signed by the Governor, and are embodied in the Legislative Acts and Resolves, as printed and published. And the words 'No act or joint resolution of the Legislature,' etc., before quoted, in the referendum amendment must be construed in the light of the context, considering all the sections and parts and articles together, as meaning 'no act or joint resolution of the Legislature having the force of law.' This is the simple and plain interpretation of simple and plain language."

In the application of that rule of construction this court held in that case that a joint address to the Governor on the part of both branches of the Legislature calling for the removal of a public officer was beyond the scope of and unaffected by the referendum. The same rule applies here with equal force. This resolution, ratifying the proposed constitutional amendment, was neither a public act, a private act, nor a resolve having the force of law. It was in no sense legislation. It was not signed by the Governor, nor could it have been vetoed by him. It was simply the ratifying act of the particular body designated by article 5 of the federal Constitution to perform that particular act. The principles laid down in *Moulton v. Scully* are decisive of this point.

The Supreme Court of Oregon, in a case decided on April 29, 1919, passed upon this branch of the question, where this same federal amendment was involved, and held that the term "any act of the legislative assembly," made the subject of referendum by the amended Constitution of Oregon, did not include a joint resolution, but only proposed laws. *Herbring v. Brown*, 180 Pac. 328.

In conclusion, it may be said that not only have all previous amendments to the federal Constitution been ratified by two-thirds of the Legislatures of the several states, but this particular Eighteenth Amendment, commonly spoken of as the prohibitory amendment, has already been promulgated by federal authorities as having become a part of the Constitution through this same avenue.

The State Department of the United States, under date of January 29, 1919, issued its proclamation announcing that this Eighteenth Amendment had been duly ratified by the Legislatures of three-fourths of the states, including by name the state of Maine, and therefore certifying, in pursuance of Rev. St., U. S., § 205 (U. S. Comp. St., § 303), that the amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States. See appendix to part 2 of U. S. Stat. 3d Session, Sixty-Fifth Congress, 1918-1919.

The construction which we adopt is evidently the same which the federal authorities have placed upon the federal Constitution. With them the chapter is regarded as closed.

For the reasons hereinbefore set forth we answer the propounded question in the negative.

We have the honor to remain,

Very respectfully,

[Signed] LESLIE C. CORNISH.
ALBERT M. SPEAR.
GEORGE M. HANSON.
WARREN C. PHILBROOK.
CHARLES J. DUNN.
JOHN A. MORRILL.
SCOTT WILSON.
LUERE B. DEASY.

DISCUSSION OF THE OPINION.

This is not a judicial decision which has the force of a binding precedent. It is merely an advisory opinion stating the individual views of the justices of the court in answer to an inquiry by the governor of Maine—an opinion delivered without the benefit of argument on either side of the question and given because the constitution of Maine, like the constitution of Massachusetts, requires the justices to answer such questions at the request of other departments of the government. While, therefore, the opinion is entitled to all the respect justly due to any opinion of the justices of that court, it does not necessarily settle the law of Maine on this subject and in view of the fact that no argument appears to have been submitted in opposition to the view taken by the court, some of the reasons may fairly be questioned as not dealing with the deeper aspects of the problem.

So far as the construction of the referendum provision in the local constitution is concerned the Oregon Court has reached a similar conclusion as to the constitution of Oregon (*Herbring v. Brown*, 180 Pac. Rep. 328), but the Washington Court has reached the opposite conclusion (*State ex rel. Mullen v. Howell*, 181 Pac. Rep. 920) and so also have the Courts of Ohio and Nebraska. In Massachusetts the question was recently raised on a petition for mandamus in connection with the "Suffrage" amendment and briefs were filed but as the necessary number of signatures on the referendum petition were not filed within the time required the Massachusetts Court declined to pass on it as a "moot" question. The question was briefly discussed in 4 Mass. Law Quarterly, 236.

When we come to what may be called the federal reasoning and its influence on the conclusion expressed in the opinion of the Justices of Maine, as far as I am aware, there has never been any decision that the so-called "accepted practice" as to the revocation of a ratification of an amendment by a subsequent legislature is a sound one. For that practice, the court refers to "Watson on the Constitution," where the action of Secretary Seward and of Congress in refusing to recognize the revocation of Ohio and New Jersey, in regard to the Fourteenth Amendment is set forth. But, there

is no discussion in the opinion as to the soundness of this action and the ratification of those states in regard to the Fourteenth Amendment was not needed to put the amendment in force as a matter of law as there were a sufficient number of ratifying states without them. That amendment was adopted under peculiar circumstances during the reconstruction days after the Civil War, and the practice under those peculiar political conditions can hardly be accepted as a final settlement of this far-reaching question. The history of the Civil War amendments as told in Professor Burgess's volume on "Reconstruction and the Constitution" is worth reading in this connection.

Mr. Watson, in his book on the constitution to which the court refers, does not discuss the subject fully. Mr. Jameson, in his book on "Constitutional Conventions," expresses the same view but he is not convincing in his discussion.

What sound reason is there for saying that ratification by a state legislature is irrevocable if a succeeding legislature votes to revoke *before the requisite number of states have ratified?*

Certainly, if a state can change its mind in favor, it can also change its mind against, ratification. Is not the notion that a state can change its mind in only one direction a most stultifying doctrine to apply in these days to the representatives of the people of the United States?

This discussion is not confined in any sense either to the "prohibition" or to the "suffrage" amendment. No one knows what amendments may be submitted in future as the result of political excitement and, if the entire national structure is to be submitted to the hasty political action of state legislatures without any opportunity for reconsideration, the country may wake up and find itself in a most serious situation some day.

As far as the particular language of the state constitutions is concerned, the Constitution of the United States, in providing that amendments might be submitted to the state legislatures, does not specify any standard form of state legislature. It does not specify whether there shall be a legislature of two houses or of one house. It does not specify that a state legislature shall act by majority or two-thirds vote or in any other particular method. The arrangement of the

state legislative processes seems to be left to the states and, in view of the growing practice of stampeding state legislatures in favor of amendments to the federal constitution, it is a serious question whether the people in the various states should not consider amending their state constitution so as to require votes by two successive legislatures on federal amendments before the state can be committed to a ratification.

Even under the rather loose methods of the I. & R., we in Massachusetts still require that amendments to the state constitution shall be considered by two successive legislatures, and there seems to be no reason why the people of Massachusetts or of any other state should be committed to hastier judgment in dealing with federal amendments particularly in view of the tendency to centralize power in Washington.

The safeguards which have hitherto existed in the dual system of government are in serious danger of being removed if the people of the states do not wake up to the fact that more deliberation is needed than has been shown recently in dealing with federal amendments which threaten the principle of local self government hitherto embodied in the national constitution.

With the greatest respect for the justices of the Supreme Court of Maine, I submit that their opinion, while it may settle the question as to the local construction of the Maine Constitution, is not convincing on the question of interpreting the Constitution of the United States and on the question of the right of a state to revoke a ratification before the required number of other states have ratified.

Mr. Watson, in his book on the constitution above referred to, quotes the correspondence between Hamilton and Madison as to the proposition of conditional ratification which had been proposed near the close of the New York Convention which finally ratified the federal constitution in 1788 shortly after ratification by the Virginia Convention. In answer to Hamilton's request for Madison's opinion, Madison replied,

"My reason is that . . . a conditional ratification . . . does not make New York a member of the union and that consequently we could not be received on that

plan. Contracts must be reciprocal—this principle would not in such a case be preserved. The constitution requires an adoption *in toto* and forever. It has been so adopted by the other states.”

Mr. Watson continues as follows:

“Madison’s expression that the Constitution requires an adoption *in toto* and *forever* shows his opinion was that affirmative action having once been exercised by the legislature, it must stand for all time and could not be affected by any subsequent legislation. The principle is similar to cases where the right to vote to authorize the issuance of bonds is conferred by statute and where there is nothing in the act limiting the number of times the vote may be taken. In such cases it has been held that a negative vote does not prevent the submission of the question again, even though several votes have been taken with a negative result. In the United States district court it was held ‘One election does not exhaust the power, unless the result is in favor of affirmative action.’

“In *Fletcher v. Peck*, Marshall, C. J., said,

‘The principle is asserted, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power.’

“The underlying principle seems to be that where the result of a vote is negative, it is the same as though no action had been taken. If it is affirmative it exhausts the power under the right to vote and is final. Thus where a vote has once been taken with an affirmative result, the power under the act is exhausted and the result cannot be rescinded by a subsequent vote, but until affirmative action is taken the power to have another vote is not exhausted. In the cases of the amendments in question, affirmative action was taken in each instance,

and therefore the power to vote on the amendment was exhausted, and subsequent legislatures had no power to rescind the former acts."

But this reasoning is not convincing. In the first place Madison's opinion related to the question of ratifying the original document by a convention specially called for the purpose of considering that document in accordance with the resolutions of the federal convention and also in accordance with the vote of the congress of September 28, 1787. Mr. Watson apparently overlooks this fact and does not discuss the difference between submission to a specially elected convention for the express purpose of considering solely the constitutional question submitted, and an ordinary state legislature either already elected or elected without special reference to the constitutional question.

The various state legislatures had nothing to do with the matter except to prepare for calling the conventions.

Jameson, in his book on Constitutional Conventions, also fails to discuss the difference between special conventions and state legislatures in this connection. (See 4th ed., §§ 583-586.)

Even Professor Burgess, who carefully analyzes the history of the Civil War amendments, leaves the matter with the following comment.

He says that the action on the part of Mr. Seward and congress in ignoring the revocation by Ohio and New Jersey of their consent to the amendment means,

"—when scientifically appreciated, that the ratification of an amendment to the Constitution of the United States is not an agreement between the 'States,' and therefore becomes valid as to each only after three-fourths of the 'States,' the constitutional number necessary to make the proposed amendment a valid part of the Constitution, shall have ratified it, but that ratification by a 'State' legislature, and *a fortiori* by a convention of the people within a 'State,' is only an indirect vote of a part of the people of the United States upon a question submitted to the suffrages of the whole people of the United States. When, therefore, this affirmative vote has been once officially announced by the proper

authorities within the 'State' to the proper authorities of the United States there is no further control over it by the authorities within the 'State.' "

None of these gentlemen seem to realize the fact, as material to this discussion, that while the Constitution of the United States was adopted as expressed in its preamble "by the people of the United States" acting through the conventions specially elected to represent them; yet, the instrument is binding not only upon the people as citizens of the United States, but also in their capacity as citizens of their own state because it is binding upon the state itself as part of the "supreme law of the land." The states form an integral part of the government created by the constitution and a very considerable portion of the laws affecting the citizens of the country are not federal laws but are state laws and are affected by federal amendments.

The states cannot be left out of the consideration of this question *as states* representing their citizens *as citizens of states* and this fact is expressly recognized by the tenth amendment which provides that,

"Powers not delegated to the United States by constitution nor prohibited by it to the states, are reserved to the *states* respectively or to the people."

Mr. Watson's reference to Madison's letter to Hamilton has no bearing on the question of amending the constitution by the action of state legislatures *after it was adopted*. He was not expressing his opinion as to the construction of the fifth article relating to amendments.

While the opinion of Madison and Hamilton may perhaps be fairly cited in support of the proposition that if special conventions are called to consider an amendment by direction of congress *they* exhaust the authority of the people of the state to act on a particular amendment when the convention has either ratified or refused to ratify *and has adjourned*, neither of these men, who had so much to do with the making of the nation, can be cited, so far as I am aware, in support of a similar rule as applied to the action of state legislatures when congress specifies that method of expression.

Indeed, it is possible that this difference between the two methods of expression provided by the fifth article is one reason why the method of special conventions has never been specified by congress since the submission of the original constitution.

It is not intended by the foregoing remarks to suggest any extreme theory of states' rights. My purpose is merely to suggest a reasonable interpretation of the constitution applied to the facts *expressly recognized in the constitution* as to the nature of each state and its relation to the federal government as representing the people of that state, for the instrument does recognize the continued existence of states as separate institutions as distinct from the federal government and expressly provides that no state can be destroyed under the constitution without its consent. It is only necessary to refer to the provision in the fifth article that the representation of any state in the senate shall not be changed without the unanimous consent of the states.

There are express limits, therefore, both in fact and in theory, to the power of the people of the United States to amend the constitution. The Civil War slogan, "An indestructible union of indestructible states," is theoretically sound *under the constitution*, although it seems to be also true, as pointed out by Burgess in the book referred to, that any state may by the actions of its people reduce itself to the condition of a territory, and that seems to be the theory behind much of the action of congress in dealing with the seceding states after the Civil War. Those states were practically readmitted to their position under the constitution, as a result of congressional action during reconstruction. But, being readmitted as they were practically on condition of their ratification of the reconstruction amendments, all the states' rights so far as future amendments were concerned revived. Among those rights there seems to be included the right of each indestructible state and of its people to a reasonable interpretation of the federal constitution which distinguishes between a specially elected convention and an ordinary legislature as a method of representative action on behalf of the people of that state in their capacity, both as citizens of the state and as citizens of the United States, in dealing with amendments.

Accordingly, it does not seem to be, and should not be placed by the courts, within the power of congress, by merely exercising its election, to place the people of the different states in a position where they may be suddenly committed without the opportunity of reconsideration by any state legislature which happens to be in session, or which may have been elected for political reasons entirely unrelated to any amendments submitted, and thus to deprive them of full opportunity for deliberate consideration of an amendment.

The effect of amendments to the Constitution of the United States on the structure of the nation and of the states is too important and too fundamental a matter to be disposed of by the path of least expense and political resistance at the absolute discretion of congress.

While it is true as suggested in the passage above quoted from Burgess that the federal constitution is "not an agreement between the states" and while the theory of "social compact" of the eighteenth century is often ridiculed, in these days, it should not be forgotten that there is still a considerable amount of substance in the modern theory of a "social compact" which in twentieth century language is expressed, in the language of trusts, as the mutual fiduciary obligations of citizens and office holders and that the Constitution of the United States does contain an element of "compact" between the people of the United States speaking through their representative bodies.

Madison, himself, in the passage above referred to, mentions the idea of "reciprocal contract" and so do the justices of Maine and it is part of the "compact" of the people of the various states when they accept the federal constitution that that instrument shall receive reasonable interpretation for their protection which its details expressly provide for, and that it shall not be interpreted merely in accordance with the political views which may actuate congress from time to time.

Secretary Seward, himself expressed a doubt whether the action of the legislatures of Ohio and New Jersey in revoking a previous ratification before the requisite number of states had ratified, might not be effectual in withdrawing the consent of those states. This appears in his announcement

of July 20, 1868 which is quoted in the foot-note¹ from pages 314-315, volume II. of Watson's book on the Constitution.

On the following day, however, congress passed a concurrent resolution,

¹ On pages 1313 and 1314 of Volume II of Mr. Watson's book on the constitution, he quotes the action of the Ohio Legislature and of the New Jersey Legislature as follows:

"The General Assembly of Ohio ratified the 14th amendment on January 11, 1867. The next legislature, on January 15, 1868, passed this joint resolution:

'Whereas, no amendment to the Constitution of the United States is valid until duly ratified by three-fourths of all the States composing the United States, and until such ratification is completed, any State has a right to withdraw her assent to any proposed amendment.

'Resolved, by the General Assembly of the State of Ohio, That the above recited resolution be, and the same is, hereby rescinded, and the ratification on behalf of the State of Ohio of the above recited proposed amendment to the Constitution of the United States is hereby withdrawn and refused.'

"The legislature of New Jersey ratified the same amendment September 11, 1866, and on March 27, 1868, a later legislature rescinded the ratification, saying: 'The proposed amendment not having yet received the assent of three-fourths of the States, which is necessary to make it valid, the natural and constitutional right of this State to withdraw its assent is undeniable.'"

Mr. Watson then quotes the document, issued by Secretary Seward, in which he expresses the doubt referred to in the text, as follows:

"In 1818 Congress passed an act requiring the Secretary of State, on receiving official notice from the States that an amendment had been adopted by the requisite number of States, to cause the amendment to be published with his certificate that it had been duly ratified. When the Secretary, Mr. Seward, announced the ratification of the 14th amendment, he said:

'Whereas, no law expressly or by conclusive implication authorizes the Secretary of State to determine and decide doubtful questions as to the authenticity of the organization of State legislatures, or as to the power of any State legislature to recall a previous act or resolution of ratification of any amendment proposed to the Constitution, and

'Whereas, it appears from official documents on file in this Department that the amendment to the Constitution of the United States, proposed as aforesaid, has been ratified by the legislatures of the following States: . . . and

'Whereas, it further appears from documents on file in this Department that the legislatures of two of the States first above enumerated, to wit, Ohio and New Jersey, have since passed resolutions respectively withdrawing the consent of each of said States to the aforesaid amendment; and whereas it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing the consent of the said two States, or either of them to the aforesaid amendments.

'Now, therefore be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the act of Congress, approved April 20, 1818, hereinbefore cited, do hereby certify that if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentioned, and so has become valid, to all intents and purposes, as a part of the Constitution of the United States.'"

"That the following states, including Ohio and New Jersey, having ratified the fourteenth article of amendment to the constitution of the United States; therefore, be it resolved that said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State."

Secretary Seward then issued another proclamation certifying that

"The said amendment has become valid to all intents and purposes to the amendments of the constitution."

The only precedent, therefore, in regard to this matter appears to be this joint resolution of congress adopted during a time of great political excitement *in the face of doubt publicly expressed by so able a lawyer as William H. Seward*, and adopted, as pointed out by Burgess, when the ratification of Ohio and New Jersey does not appear to have been necessary for the ratification of the amendment. The detailed account of this matter by Burgess is quoted at length in a note at the end of this discussion.

While no attempt has been made in this article at an exhaustive study of this question which its importance may deserve, yet, the question is of such great and growing importance that it deserves to be called to the attention of the bar of the country in order to provoke discussion before the subject is disposed of by the judicial acceptance of the somewhat dogmatic statements and the inadequate reasonings of text writers, when William H. Seward officially expressed doubt upon the question.

In order to provoke discussion, therefore, I respectfully submit that there is no "accepted practice" of a nature to justify the passages in the opinion of the justices of the Supreme Judicial Court of Maine, and that the question of constitutional law is still open and not in any sense effected by any action hitherto taken by congress.

Another statement in the opinion of the justices of Maine, quoted at the beginning of this note, may also be questioned. They say that,

"The state legislature, in ratifying the amendment as congress in proposing it, is not, strictly speaking, acting in the dispatch of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by Article V."

While it is true that neither congress or the state legislatures are exercising *ordinary* legislative duties and functions in submitting and ratifying amendments to the federal constitutions, I respectfully submit that both of those bodies are exercising the highest form of legislative duties and functions which the Constitution of the United States and the constitutions of the several states, in providing for the existence of these legislative bodies, impose upon them. If the extreme importance of the relative functions of congress and of the state legislatures in this matter are obscured by calling one a "submitting" function and the other a "ratifying" function as if they differed in nature from the deliberative functions inherent in the legislative institution, it is unfortunate.

Both congress and the state legislatures in acting upon these amendments function as "law-making bodies" in the highest sense because they are engaged in making "the supreme law of the land" which is to be forced down the throats, not only of the people of the ratifying states, but of the people of the non-ratifying states, and, under any reasonable construction of the tenth amendment, the people of all the states have a right that this highest form of the law making function should be clearly understood and its responsibility felt during its exercise, and that the machinery provided for it should be so interpreted and understood that the deliberative character and performance of the function should be preserved and insisted upon.

While this may appear to be insisting upon the obvious, yet, as Judge Holmes said, some years ago in a public address, one of the things which the American people appear to need in these days is "instruction in the obvious" and, with the present obvious tendency toward establishing the practice of "passing the buck" as one of the deliberative principles of American government, it is not perhaps unnece-

essary to remind, even members of the bar, of the exact and peculiarly responsible function placed upon congress and the various state legislatures in connection with the instrument upon which the structure of the nation depends.

Accordingly, without the slightest intention of quibbling over words, I submit that the statement of the justices of the Supreme Court of Maine, that congress and the state legislatures in dealing with federal amendments are not "strictly speaking acting in the dispatch of legislative duties and functions as a law making body" is an inaccurate statement which obscures the fundamental character of the questions involved in their opinion. Does not the statement, followed by the subsequent remarks quoted from that opinion, indicate that the essential nature of the problem under the fifth article of the Federal Constitution has not been thoroughly grasped and discussed in that opinion?

For similar reasons arising out of the essentially deliberative and continuing character of the function performed by Congress in submitting amendments, there seems to be no reason in the nature of the function, or in the relations between Congress and the states, why, after an amendment has been submitted by one congress, the same, or some succeeding, congress should not revoke the submission if the requisite number of states have not ratified such amendment prior to such revocation. In other words, the process of amending the Constitution of the United States on behalf of the people of the United States through Congress and the state legislatures is a joint legislative function requiring the concurrent and continuing assent of Congress and of three-fourths of the states.

It is submitted that the people of the United States, as represented as a whole by Congress and in separate parts by their state legislatures, have a right to change their minds at any time on such a question before the number of assents specified in article five is reached, just as much as any member of Congress or of any state legislature, in representing the people, has a right to change his mind and change his vote on a roll call after he has once voted *before the final vote is announced*.

F. W. GRINNELL.

Note I.

As to how far the question of final ratification is a judicial, as distinguished from a political, question see 29 Harvard Law Review 532, footnote 23, and Hoar "Constitutional Conventions" 162-163.

Note II.

The account of the Ratification of the Fourteenth Amendment as given in Burgess "Reconstruction and the Constitution" (202-206) is as follows:

"On the 28th day of July, Mr. Seward, the Secretary of State, issued his proclamation, declaring the ratification of the proposed Fourteenth Amendment to the Constitution of the United States by the legislatures of thirty States of the Union, and its consequent validity as a part of the Constitution of the United States.

Eight days before this proclamation, that is on the 20th, Mr. Seward had issued a proclamation declaring that the legislatures of twenty-three States, viz., of Connecticut, New Hampshire, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska and Iowa, had ratified the proposed Fourteenth Amendment, and that six 'newly-constituted and newly-established bodies avowing themselves to be, and acting as, the legislatures, respectively, of the States of Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama,' had also ratified it; that the legislatures of Ohio and New Jersey had subsequently passed resolutions withdrawing their ratification of the Amendment; and that, if these latter resolutions of the legislatures of Ohio and New Jersey should be disregarded, the proposed Fourteenth Amendment had been adopted by the legislatures of twenty-nine of the thirty-seven 'States' of the Union and had thus become a valid part of the Constitution of the United States.

Besides the question expressed in this Proclamation, Mr. Seward indicates by his language a further question, viz., whether the six 'newly-established bodies, avowing themselves to be, and acting as, the legislatures, respectively, of

the States of Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama' were genuine 'State' legislatures. They were the legislatures established under the Reconstruction Acts of Congress but as Congress had refused to recognize the 'States' for whom these bodies acted as entitled to representation in Congress, that is as 'States' having the rights of 'States' of the Union, until after these bodies had ratified the proposed Fourteenth Amendment to the Constitution of the United States, it was no wonder that so good a constitutional lawyer and so logical a thinker as Mr. Seward had his doubts as to whether these bodies were genuine 'State' legislatures.

In order to quiet these doubts, if possible, the two Houses of Congress passed on the following day, July 21st, the following concurrent resolution:

'Whereas the legislatures of the States of Connecticut, Tennessee, *New Jersey*, Oregon, Vermont, West Virginia, Kansas, Missouri, Indiana, *Ohio*, Illinois, Minnesota, New York, Wisconsin, Pennsylvania, Rhode Island, Michigan, Nevada, New Hampshire, Massachusetts, Nebraska, Maine, Iowa, *Arkansas*, *Florida*, *North Carolina*, *Alabama*, *South Carolina* and *Louisiana*, being three-fourths and more of the several States of the Union, have ratified the Fourteenth Article of Amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress; therefore,

Resolved by the Senate (the House of Representatives concurring), That said Fourteenth Article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State.'

Upon the basis of this resolution, which decided, in so far as Congress can decide, that the consent of the legislature of a 'State' to a proposed amendment to the Constitution of the United States cannot be withdrawn when once given, and that the 'newly-constituted and newly-established bodies, avowing themselves to be, and acting as, the legislatures, respectively, of the States of Arkansas, Florida, North Carolina, Louisiana,

South Carolina, and Alabama' were genuine 'State' legislatures qualified to vote upon the ratification of a proposed amendment to the Constitution of the United States, Mr. Seward issued his proclamation of the 28th of July, above recited. As the Georgia Legislature ratified the proposed amendment on the 21st inst. and also gave its pledge not to allow the repudiation article in its constitution to be enforced, Mr. Seward included Georgia in this last proclamation.

It will be seen that both Mr. Seward and Congress counted all of the Southern communities which had ever been 'States' as being 'States,' making the whole number of 'States' thirty-seven, and the number necessary for ratification of the amendment twenty-eight. Upon this basis of calculation two more than the necessary number had ratified at the date of Mr. Seward's final proclamation. It will also be seen that both Mr. Seward and Congress, that is that both the legislative and executive departments of the Government, ignored the attempt of Ohio and New Jersey to withdraw their consent to the amendment, and fixed the precedent in the constitutional practice of the United States that a 'State' legislature cannot reconsider its ratification of an amendment to the Constitution of the United States at any time. This means, when scientifically appreciated, that the ratification of an amendment to the Constitution of the United States is not an agreement between the 'States,' and therefore becomes valid as to each only after three-fourths of the 'States,' the constitutional number necessary to make the proposed amendment a valid part of the Constitution, shall have ratified it, but that ratification by a 'State' legislature, and *a fortiori* by a convention of the people within a 'State,' is only an indirect vote of a part of the people of the United States upon a question submitted to the suffrages of the whole people of the United States. When, therefore, this affirmative vote has been once officially announced by the proper authorities within the 'State' to the proper authorities of the United States there is no further control over it by the authorities within the 'State.'

If, however, the votes of Ohio and New Jersey had not been counted in the affirmative, there was still a three-fourths majority of thirty-seven 'States' in favor of ratification. And

if the ten Southern communities had been left out of the computation altogether, which would have made the Union to consist, so far as that part of it erected into 'States' was concerned, of twenty-seven 'States,' there would still have been more than a three-fourths majority in favor of ratification, with or without Ohio and New Jersey. The correct procedure, from a scientific point of view, would undoubtedly have been to have computed the necessary majority upon the basis of twenty-seven 'States,' to have included Ohio and New Jersey among the 'States' whose legislatures voted for ratification, and then to have admitted the ten Southern communities as 'States' under the Constitution of the United States, *with the Fourteenth Amendment as an already established part of it*, concerning which they had no more to say than they had in regard to any other part of the Constitution. But, however that may be, no objection can be made to the validity of the Fourteenth Amendment on the ground of the majority by which it was ratified. In whatever way we may compute the whole number of 'States' and the majority voting in the affirmative, the Amendment was lawfully ratified."

—Reconstruction and the Constitution, Burgess 202-206.

THE NEW ACT TO ORGANIZE IN DEPARTMENTS THE
EXECUTIVE AND ADMINISTRATIVE FUNCTIONS
OF THE COMMONWEALTH, CHAPTER 350 OF
THE GENERAL ACTS OF 1919.*

The Act to Organize in Departments the Executive and Administrative Functions of the Commonwealth, sometimes referred to as the Consolidation Act, was the response of the General Court to the mandate contained in the 66th amendment to the Constitution of Massachusetts. The 66th amendment was the last of the nineteen amendments ratified by the people at the election in November, 1918. It provided that "On or before January 1, 1921 the executive and administrative work of the Commonwealth shall be organized in not more than twenty departments, in one of which every executive and administrative office, board and commission, except those officers serving directly under the Governor or the Council, shall be placed. Such departments shall be under such supervision and regulation as the General Court may from time to time prescribe by law."

Inasmuch as all of the propositions of the Constitutional Convention were approved by the people, it is not possible to say just what led them to favor the 66th amendment. The question on the ballot asked them to ratify an amendment, "To provide for the more efficient administration of the business of the Commonwealth." Put in that way, it is not surprising that the amendment was accepted; but so far as any specific reason actuated the voters it seems safe to assert that it was the belief that there were too many commissions in Massachusetts and that they might be consolidated with good results. While Massachusetts has possessed many governmental agencies—the work of the Commonwealth being performed by more than one hundred offices, boards and commissions—it is worth while to point out, that the agencies were created by popular demand as the exigencies of the situation seemed to require. For instance, as recently as 1917 a Bureau of Immigration was established to deal with the alien population of Massachusetts, in an endeavor to develop their understanding of Ameri-

* This article first appeared in the "Boston Transcript" of July 23, 1919.

can ideals and institutions and to promote their assimilation; and no one would say that the work was of a character that should not have been attempted.

On the whole, and in comparison with the other states of the Union, the business of the Commonwealth has been well done, and in many wise undertakings Massachusetts has been a successful leader. Yet, added as they have been from time to time, the establishment of the administrative agencies of the Commonwealth has taken place with little regard for their relations to each other and to the scheme of government as a whole. The situation was well stated by Governor McCall in his inaugural address in 1916 when he said, "We have a hydra-headed system of administration with a minimum of central responsibility" . . . "the management of the business of the Commonwealth is diffused and exercised through a multitude of little executives;" and this lack of responsibility and of co-ordination, it is believed, was the real reason why the Constitutional Convention proposed the 66th amendment.

The natural tendency of a commission made up of men interested in their work is to extend its scope and to accentuate its importance. Earnestness is a desirable and very proper quality in public officials, but when possessed by the personnel of many separate agencies acting with little or no "team play" and without centralized control, some duplication of effort and loss of perspective is the inevitable result. The adoption of the budget system to govern the appropriations made for the administrative activities of the Commonwealth served to correct the situation so far as the amounts to be expended were concerned, and was a step in the right direction. The second step, namely, to centralize responsibility for the work of the agencies that have the money to expend, was taken by the 66th amendment.

The language of the amendment was neither apt nor accurate. Obviously the convention did not intend that the General Court should establish twenty departments and then place all of the executive and administrative agencies in *one* of them, though that is the way the amendment reads; and there are no officers of the Commonwealth serving directly under the Council. The military and naval officers serve under the Governor, and such other officers as are connected with the

chief executive serve under the Governor and Council. It was conceived that what the convention meant was that all of the executive and administrative agencies of the Commonwealth should hereafter be contained in not more than twenty departments, with the exception of officers like the Supervisor of Administration, who because of their peculiar functions would better remain, or be placed under, the Governor and Council, and the legislature acted upon that assumption.

The amendment gave the General Court until January, 1921, to effect the reorganization, but Governor Coolidge urged that the work be started and completed during the session of 1919. The legislature accordingly took up the task this year, and it fell to the Joint Committee on Administration and Commissions to do the constructive work. The committee had referred to it not only that portion of the Governor's message which related to the constitutional amendment but numerous bills dealing with the organization of the administrative agencies of the Commonwealth. Some merely sought to change particular agencies; others, like the recommendations of the Supervisor of Administration, were frank suggestions as to how the 66th amendment might be complied with, and two of the bills presented a complete grouping of all the offices, boards and commissions.

For three months the committee held public hearings upon the measures referred to it, and then took up the question as to what new departments should be established under the amendment and what activities should be contained in them without attempting to organize each department in detail. Having agreed tentatively upon the number, names and composition of the departments, the arrangement was published in the newspapers that people interested might know the plan which it was proposed to carry out. Thereafter the committee proceeded to draft measures organizing each department, having first determined upon a general framework for all the departments and that done, a complete draft of an act dealing with all the departments was printed for the use of the committee, discussed section by section, reprinted in full, and again thoroughly discussed. Each department had its own peculiar problems. Such changes as seemed necessary to meet the problems were made in the drafts, provisions were included covering all of the departments, and on

June 6 the resulting act was reported in the House of Representatives as House No. 1830. It passed that body in due course, with some amendments that seemed desirable (House 1900), and was favorably acted upon by the Senate, with a few similar amendments and signed by the Governor on July 23. The bill thus enacted and numbered chapter 350 of the General Acts of 1919 I am to explain.

The 66th amendment fixed twenty as the limit in number of the executive and administrative departments of the Commonwealth. Inasmuch as four already existed under the constitution, namely, the departments of the Secretary, Treasurer and Receiver General, Auditor, and Attorney General only sixteen new departments could be established. The Consolidation Act adds fifteen as follows, viz.: Agriculture, Conservation, Banking and Insurance, Corporations and Taxation, Education, Civil Service and Registration, Industrial Accidents, Labor and Industries, Mental Diseases, Correction, Public Welfare, Public Health, Public Safety, Public Works, and Public Utilities. The act originally established a "Department of The Metropolitan District," but inasmuch as the metropolitan boards are not state wide in their scope and are financed locally the title of that group was changed to "The Metropolitan District Commission."

Some of the titles of the departments are not new. For many years the Commonwealth has had a State Department of Agriculture; and a State Department of Health was established in 1914, succeeding the State Board of Health. The office of Tax Commissioner and Commissioner of Corporations has existed for some time, and there has been a Board of Education, an Industrial Accident Board, a Board of Labor and Industries, and a Commission on Mental Diseases. They are all made departments by the act, and two of them, the Board of Education and the Board of Labor and Industries, are completely reorganized.

It is to be noted that the constitutional amendment did not in terms call for a "consolidation" of the numerous administrative agencies of the Commonwealth. The requirement was that they should be "placed" in not more than twenty departments. But merely to group the agencies under departmental titles, without undertaking to bring them into working relations with each other under a responsible head,

would be to follow the language of the amendment and make no attempt to interpret its spirit. Further, the amendment did not take away the general power of the legislature over the institutions of government that it had created. The bills referred to the Committee on Administration and Commissions included several aimed to secure a consolidation as well as a reorganization of the offices, boards and commissions, and the act (House 1830) was reported by the committee on no less than twenty measures.

The committee conceived that the great object of the 66th amendment was to secure not so much centralization of authority as centralization of responsibility. Under the present order there are many offices, boards and commissions that are doing their work well, and the incentive to continue might be largely lost to the members if their independence were wholly destroyed. The committee sought to retain a measure of independence where the public interest would benefit. In other words, it aimed to retain the good in the present system so far as possible, and at the same time to secure the advantages of a centralized system, but without saddling the state with the evils of a bureaucracy. How far it succeeded time only will tell.

In general explanation of the plan followed, it may be said that with the exception of a few departments hereafter referred to, each department is placed in charge of a commissioner appointed by the Governor with the consent of the Council. In some cases the commissioner has an advisory board appointed in like manner. Where the work of the department requires, provision is made for organizing it in divisions in charge of an official termed, not a "deputy," but a "director," to show that he is the head of the particular work which the division has to perform. For example, in the Department of Corporations and Taxation the deputy now in charge of income taxes will hereafter be styled Director of the Income Tax Division, and the assistant now in charge of inheritance taxes will be the Director of the Division of Inheritance Taxes.

In some cases the directors are to be appointed by the commissioner, as in departments where the work is of one kind or where little change in the existing organization has been made, examples being the Department of Agriculture and the

Department of Corporations and Taxation. In other cases, where it was necessary to tie together activities only loosely allied, the directors as well as the commissioner are to be appointed by the Governor. This takes place in the new Department of Conservation, which contains three divisions, a Division of Forestry, including the functions of the former State Forester and State Forest Commission, a Division of Fisheries and Game, including the functions of the former Fish and Game Commission, and a Division of Animal Industry, consisting of the former State Department of Animal Industry, so called. In this way the measure of independence of those activities, to which reference has been made, is retained, but they are subject to the general supervision of the head of the department, who hereafter makes the annual reports required by law, and who has control over the appointment of employees.

The Department of Education includes not only the functions of the old Board of Education, but of the Free Public Library Commissioners, the Bureau of Immigration, and the Commission for the Blind. The last three agencies will continue to perform their duties as heretofore, but as separate divisions of the department and with a reorganization of the Bureau of Immigration. While the head of the department has general supervision of their work, their present independence is maintained, leaving it to be determined in the future whether a more complete consolidation is desirable, and whether, also, it may not be desirable to transfer some of their functions to other agencies.

This is not the first attempt by a legislature of Massachusetts to effect a reorganization of the state's administrative agencies. In 1914 there was a well thought out reorganization of the Board of Health, the plan of which was followed by the Committee on Administration and Commissions so far as departments doing one line of work were concerned, namely, a commissioner appointed by the Governor with an advisory board or council of not more than six. There were also reorganizations in 1916 on the recommendation of Governor McCall, when the Commission on Mental Diseases was established (succeeding the Board of Insanity), the Port Directors and Harbor and Land Commissioners consolidated, and the Committee on Economy and Efficiency abolished and the office

of Supervisor of Administration substituted in its stead. Last year the Commission for the Blind was reorganized. Those were all bodies doing one line of work, and not until this year was it necessary to attempt to tie together agencies dealing with unrelated subjects.

The Secretary, Treasurer and Receiver General, Auditor, and Attorney General being elected independently of the Governor, it was felt that in a few instances alone should an executive or administrative agency be transferred to their departments, otherwise the object of the amendment might not be attained. So only such activities were added to those departments as already touched upon them or could well be placed in them without doing violence to the mandate of the people. Thus the duty of taking the decennial census is transferred by the act to the Secretary of State, and the Commissioner of Public Records abolished as an independent official and made a deputy of the Secretary with the title, Supervisor of Public Records. The theory of the last change is that the Secretary is the recording officer of the Commonwealth and that oversight of the keeping of records outside his office may well be in his charge. The Treasurer's department is given the Board of Retirement, of which he is now a member, and the Commissioners on Firemen's Relief, of which he is made a member.

The Bureau of Statistics disappears entirely in the reorganization, the taking of the decennial census becoming a function of the Secretary, as above stated, the compilation of municipal statistics, auditing of municipal accounts, and the certification of the notes of towns and districts being transferred to the Division of Accounts of the Department of Corporations and Taxation, and the remaining functions of the Bureau, including the compilation of the statistics of labor and manufactures, so called, and the oversight of public employment offices being transferred to the Department of Labor and Industries.

With respect to the agencies serving under the Governor and Council, the committee acted upon the belief that they ought to be limited to those which could not function well in one of the departments, or which, because of their peculiar duties, would better hold a position directly under the chief executive, and only such agencies as the Supervisor of Administration, the Ballot Law Commission and the Board of

Appeals from the Decisions of the Tax Commissioner, and a few special commissions, will be found in that group.

One new official is placed under the Governor and Council to be known as Superintendent of Buildings. To him are transferred the powers and duties of the Sergeant-at-Arms, the State House Commission, and the Governor and Council with respect to the State House. He is also given charge of the purchase of office furniture, stationery and office supplies, for all the departments, and the making of repairs and improvements in and about the State House and in other buildings occupied by agencies of the Commonwealth. To carry out his duties he may employ a qualified purchasing agent and a storekeeper.

The office was established on the recommendation of the Supervisor of Administration in a report filed by him (House 1378 of 1919). The Sergeant-at-Arms is elected annually by the two branches of the legislature, and it was pointed out by the Supervisor that he exercised administrative authority, "but without administrative responsibility." The argument had weight with the committee and it was thought that a more business-like management of the buildings of the Commonwealth would be obtained if authority over them were placed in the hands of one official, and if some method were provided for the standardizing of purchases for all of the departments. It is to be noted, however, that the Superintendent of Buildings is not a purchasing agent except in the matter of office equipment and supplies, and the Sergeant-at-Arms will retain all his proper authority as an officer of the General Court.

The limit of twenty arbitrarily fixed by the amendment, leaving only sixteen new departments, resulted in requiring the joining of some activities that were foreign to each other in order that all the offices, boards and commissions of the Commonwealth might be included within the departments called for. Notable instances will be found in the new departments of Banking and Insurance and of Civil Service and Registration. In light of the difference in the character of the activities, it was not practicable to organize those departments like the others, with a commissioner at the head having directors under him. No one would have felt satisfied. So the committee accepted the facts and established the De-

partment of Banking and Insurance with three separate divisions, of Banks and Loan Agencies, Insurance, and Savings Bank Life Insurance, each in charge of a commissioner appointed by the Governor, and each independent of the others. In the case of the Department of Civil Service and Registration, the various boards of registration in pharmacy, medicine, veterinary medicine, etc., had to be included somewhere. They have nothing to do with the civil service, affect the public health somewhat, and may be said to be educational in character. But the Departments of Public Health and Education without the boards were as large as they ought to be, and it was the desire to provide for the proper functioning of the various activities, and not the mere choice of the department by name, which governed the committee. The boards were accordingly grouped in a Division of Registration of the Department of Civil Service and Registration, with a director to supervise their work; and the Civil Service Commission was made another separate division of the department, reorganized to consist of a commissioner giving his whole time, and two associate commissioners, all appointed by the Governor.

A detailed analysis of the new departments would be beyond the scope of this account, but an outline of some of them may be given. The Board of Labor and Industries is completely reorganized. The department of that name will be administered by a commissioner, an assistant commissioner, who may be a woman, and three associate commissioners, one a representative of labor and one a representative of employers of labor. It is intended that the authority of the assistant commissioner will extend to women and minors. The associate commissioners, among other duties, will exercise the functions heretofore exercised by the Board of Conciliation and Arbitration and the Minimum Wage Commission; and, in order to make it clear that the principle of arbitration is to be retained and the work of the old board continued, the act was amended to provide that the associate commissioners should be known as the Board of Conciliation and Arbitration.

The Department of Correction succeeds to the functions of the Bureau of Prisons, and will be in charge of a commissioner appointed by the Governor. The commissioner is given authority to appoint two deputies, with the approval of the

Governor and Council. The duties of the Board of Parol will be performed by a new board to consist of one of the deputies designated by the commissioner and two other members appointed by the Governor, the Governor to name the chairman of the board.

The Department of Public Welfare succeeds to the authority of the former State Board of Charity and the Homestead Commission, so called. It will be in charge of a commissioner and an advisory board of six members, two to be women, appointed by the Governor. The advisory board will exercise the functions of the former Homestead Commission and assist the commissioner in the problems of the department. In the organization of the department the act provides for three divisions, a Division of Aid and Relief, of Child Guardianship, and of Juvenile Training, the first to exercise the functions of the division of adult poor of the Board of Charity, the second of minor wards of the same board, and the third division to consist of the Board of Trustees of the Training Schools. The directors of the first two divisions are to be appointed by the commissioner with the approval of the Governor and Council, and the Director of Juvenile Training will be one of the Trustees of the Training Schools designated by the Governor.

The Department of Public Health will consist of the present State Department of Health, with the Hospitals for Consumptives transferred thereto and made a Division of Sanatoria, in charge of a director appointed by the commissioner with the approval of the Governor and Council.

The Department of Public Safety succeeds to the functions of the District Police, Board of Boiler Rules, Board of Elevator Regulations, and the Fire Prevention Commissioner of the Metropolitan District. It will be presided over by a commissioner appointed by the Governor and organized in three divisions, a Division of State Police, under the immediate charge of the commissioner, a Division of Fire Prevention, in charge of a director to be known as State Fire Marshal, and a Division of Inspection, in charge of a director to be known as Chief of Inspections. The act reads that whenever the Governor shall deem it necessary to provide more effectively for the protection of the Commonwealth he may authorize the appointment of not exceeding one hundred

additional state police, to be temporary appointments until the General Court authorize otherwise, and provision is made for the organization and equipment of the additional police and for means of moving them quickly.

The Department of Public Works will be in charge of a commission made up of a commissioner and four associates, all appointed by the Governor, succeeding to the authority of the former Highway Commission and the Commission on Waterways and Public Lands. The department is to be organized in two divisions, one of Highways and one of Waterways and Public Lands, the Governor to designate two of the associate commissioners to each division. The commissioner is authorized to appoint, subject to the approval of the Governor and Council, a Registrar of Motor Vehicles, who will have the authority of the old Highway Commission relative to motor vehicles, appeals from his decision to be taken to the commissioners of the Division of Highways.

The Department of Public Utilities will be in charge of a commission of five members appointed by the Governor, one of whom he shall designate as chairman, who will succeed to the functions of the present Public Service Commission and the Gas and Electric Light Commissioners. Authority is given the chairman to divide the work of the commission, two commissioners being required to participate in the hearing and three in the decision of all matters other than those of a formal character, a majority of the commissioners participating being necessary for a decision. But with the consent of the parties a hearing may be held by one commissioner, and the right of appeal to the Supreme Court is protected.

The Metropolitan District Commission is to consist of a commissioner and four associates appointed by the Governor, succeeding to the functions of the Metropolitan Park Commission and the Metropolitan Water and Sewerage Board.

The legislature did not undertake definitely to specify the salaries of the officials of the new departments except that in the case of such officers as the Commissioner of Public Health and the Commissioner of Mental Diseases, whose organizations are subjected to little or no change; their salaries having been fixed for some time are left as at present. In other cases it was thought that there should be some elasticity and it is provided that the salaries are not to exceed stated

amounts, with authority given to the Governor and Council to determine the exact amount as the work of the department would seem to demand. Except in a few instances also, it is not required by the act that the officials shall give their whole time to the work of the departments. Here again it was thought that opportunity should be afforded for the exercise of a discretion, and a general provision was inserted authorizing the Governor to require full time service of officials appointed by him and who receive a salary.

Hereafter no head of a department may organize divisions other than those established by law without the approval of the Governor and Council, a provision designed to furnish the chief executive with a means of control over the extension of the work of the new departments. Existing employees of the offices, boards and commissions abolished by the act are transferred as temporary appointees to the departments succeeding them, with the provision that the employees can be reappointed without further civil service examination. This protects the employees so far as it was thought they ought to be protected and at the same time does not interfere with the new department heads in the organization of their departments. The employees are protected in a similar manner in respect of their rights to pensions. The compensation of new employees is made subject to the Standardization Act, so called, of last year,* but existing employees who are reappointed are not to suffer a reduction in compensation where it is specifically fixed by statute.

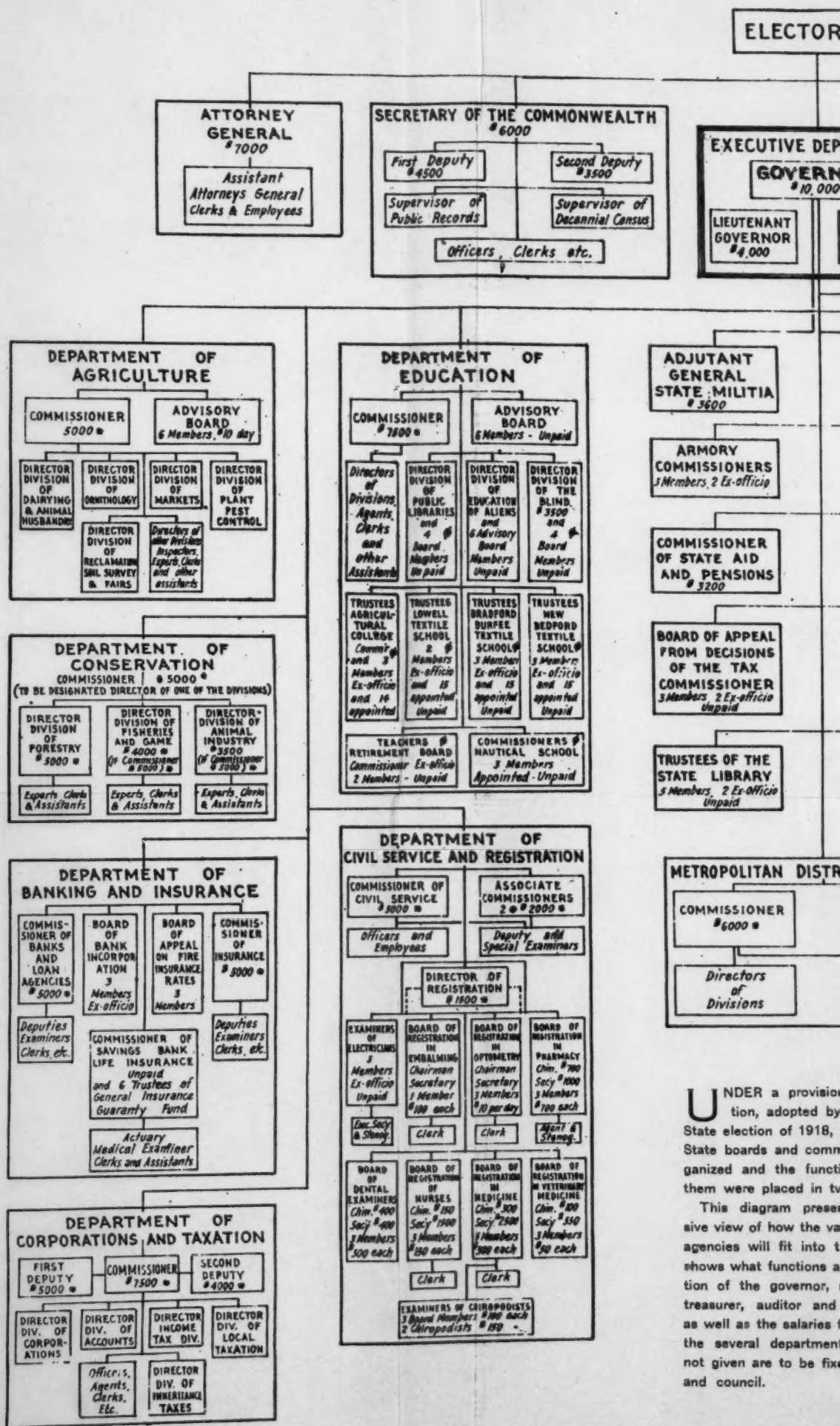
It is not claimed that the Consolidation Act is perfect, but it was drawn with great care and every effort was made to perfect it consistent with what was construed to be the spirit of the amendment. What was required was a scheme for the establishment of better order in the administration of the affairs of the executive branch of the state government leaving the correction of mistaken details to the future. Upon the Governor rests the duty to select the proper personnel, and upon the officials he appoints the duty to see that the machinery which the legislature has provided is intelligently operated.

It may be that the act places an undue burden on the Governor and Council, but in an act based upon the theory of the

* Chapter 228 of the General Acts of 1918.

State Executive and Administrative

DIAGRAM OF DEPARTMENTAL ORGANIZATION



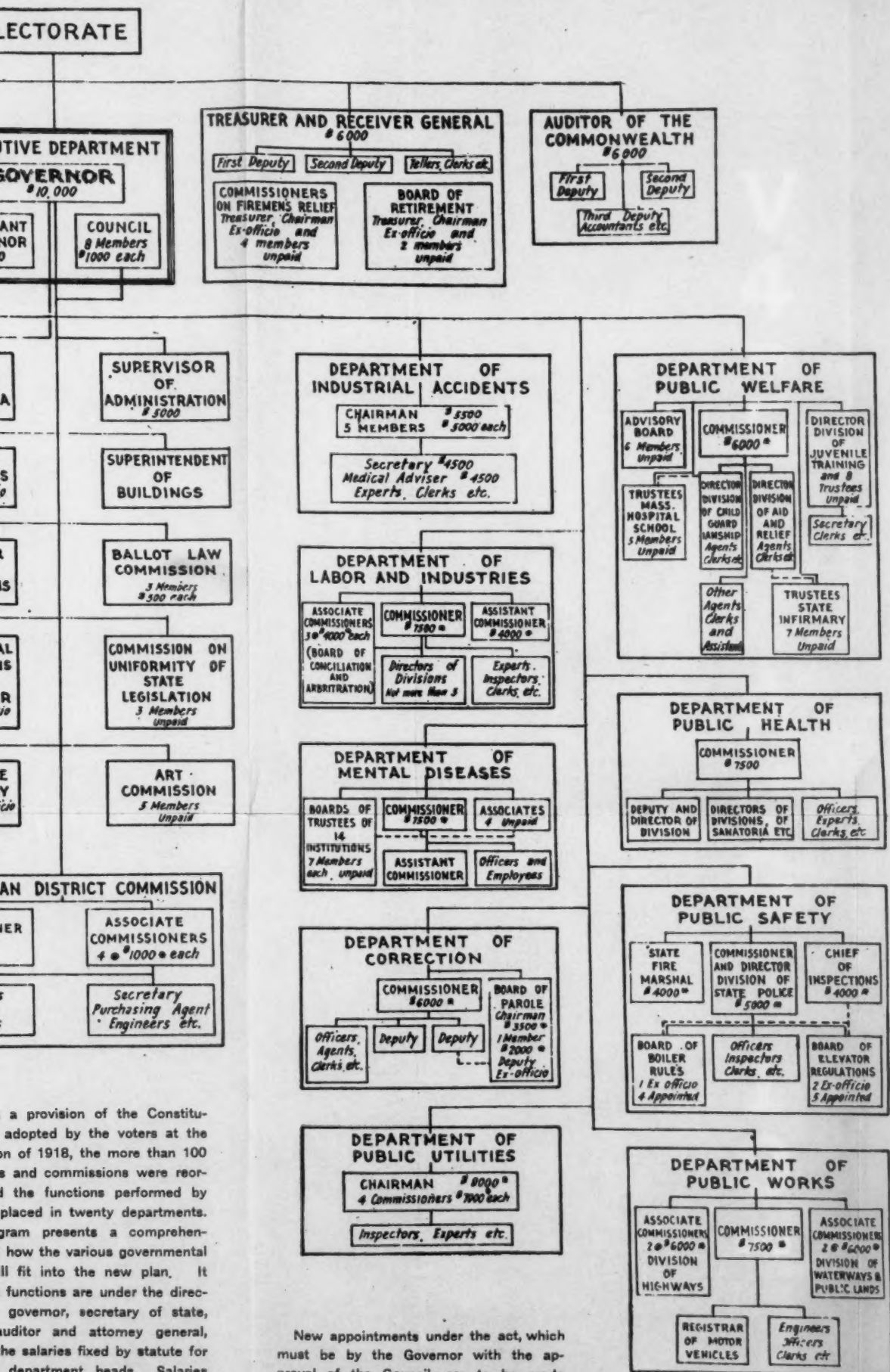
UNDER a provision of the constitution, adopted by the State election of 1918, the State boards and commissions were organized and the functions of the several departments were placed in the hands of the governor, treasurer, auditor and council, as well as the salaries of the several departments were not given are to be fixed by the governor and council.

• Have authority to appoint subordinate officers and employees

• Maximum Salary

ve Functions Now in 20 Departments

ON UNDER CHAPTER 350, GENERAL ACTS 1919



New appointments under the act, which must be by the Governor with the approval of the Council, are to be made Nov. 15, and the reorganization is to take effect Dec. 1 of this year.

Prepared by the Office of the Supervisor of Administration

centralization of responsibility in the Governor the granting to him of the means of securing that responsibility was essential. It is doubtful if on the whole there will be financial saving to the Commonwealth. Comparison between the old and new order in that respect are difficult because of the increase in salaries and in the cost of operation of the departments that has taken place in the past few years. There ought, however, to be an increase in efficiency, and if it is obtained the change will be well worth while. In any event, the people directed that the offices, boards and commissions of the Commonwealth be organized in not more than twenty departments, and the General Court of 1919 accomplished the task.

FITZ-HENRY SMITH, JR.

Note.

Mr. Smith, the author of the foregoing article, was the House chairman of the Joint Committee on Administration and Commissions which prepared the Reorganization Bill. Hon. Clarence W. Hobbs, Jr., of Worcester, was Senate chairman.

CAN A HUSBAND OR WIFE CREATE A TENANCY
BY THE ENTIRETY IN THEMSELVES DIRECTLY
UNDER CHAPTER 304 OF 1912 AND CHAPTER 93
OF 1918?

By Chap. 304 of 1912, it was provided that:

"Husband and wife may make conveyances of real estate to each other except by way of mortgage, as if unmarried; but no such conveyance shall have any effect, either in passing title or otherwise, until the deed describing the property to be transferred is duly acknowledged and recorded in the registry of deeds for the district where the land lies."

By Chap. 93 of 1918, it was provided that:

"Real estate, including any interest therein, may be transferred by a person to himself jointly with another person or persons in the same manner in which it might be transferred by him to another person."

Relying upon these statutes, a number of conveyances have been made during the past few years by a husband directly to himself and his wife, or by a wife directly to herself and her husband as tenants by the entirety, and the question has arisen, although it has not yet apparently come into court, whether these conveyances are operative under the statutes above quoted. There is a difference of opinion among members of the bar on the question, and the following correspondence between several members of the bar has taken place in regard to it.

As the question is one of practical interest which is likely to arise at any time in view of the fact that such conveyances have been made and may be made in future by those who believe the statutes provide for them, the substance of the correspondence is printed for the information of the bar.

CORRESPONDENCE.

First Letter.

DEAR —:

We have talked over the question which you raised whether a tenancy by the entirety comes within the

statute allowing conveyances by a man to himself and another to be held jointly.

The cases of *Morris v. McCarty*, 158 Mass. at p. 12 and *Palmer v. Treasurer*, 222 Mass. at p. 264, in which other cases are cited, seem to show that a tenancy by the entirety is a form of joint tenancy, so that it seems to come within the statute.

Yours very truly,

This letter was submitted by the person to whom it was addressed to another member of the bar, who answered as follows:

Second Letter.

DEAR —:

Your proposition is that a man can convey directly to his wife and himself as tenants by the entirety. You concede that this can only be done, if at all, by virtue of the provisions of Chapter 93 of the Acts of 1918, "real estate may be transferred by a person to himself jointly with another person," and of Chapter 304 of Acts of 1912 authorizing conveyance between husband and wife.

My first difficulty is that in the case you put, there is no other person. It is true that to distinguish the estate from a tenancy in common tenancy by the entirety is commonly (and somewhat loosely) spoken of as a joint estate. It is joint in the sense that there is survivorship, but its essential feature is that the husband and wife are not "himself and another person," but one person.

As Professor Reeves puts it (Reeves Real Property, Section 688 "the oneness of the owners is the basis of this form of co-tenancy." As stated in Jones (Real Property, Section 1790) "By reason of their legal unity by marriage they together take the whole estate as one person. Neither has a separate estate or interest in the land, but each has the whole estate. It is a sole and not a joint tenancy. They have no moieties. Each holds the entirety. They are one in law, and their estate one and indivisible. Tenancy by the entirety resembles a joint tenancy in that the right of survivorship is attached to it, but it is not a joint tenancy either in substance or form. At common law a husband and wife were regarded

as one person and a conveyance to them by name was a conveyance in law to but one person."

Joint tenancy in fact resembles tenancy in common much more nearly than it does tenancy by the entirety. The element in tenancy by the entirety that differentiates it from both joint tenancy and tenancy in common is the indivisibility of the estate.

There are many expressions in Massachusetts decisions in which tenancy by the entirety is spoken of as though it were a joint tenancy although of a peculiar nature, but the difference between it and joint tenancy has always been fully recognized. This is clearly brought out in the case which Mr. —cites of *Palmer v. Treasurer*, 222 Mass. 263, where after quoting Chief Justice Field's statement that "tenancy by the entirety is essentially a joint tenancy, modified by the common law doctrine that husband and wife are one person," the court goes on to point out the difference between joint tenancy and tenancy by the entirety, and then states that "when a tenancy by the entirety is created the husband and wife take the estate as one person, and they take but one estate." In *Woodward v. Woodward*, 216 Mass. 1, it is held that husband and wife can hold real estate even at common law in joint tenancy as distinguished from an estate by the entirety.

Possibly under the 1918 statute a man could convey to himself and his wife to hold as joint tenants but not as tenants by the entirety. When, however, a man conveys to himself and his wife to hold as tenants by the entirety, it is not a transfer "by a person to himself jointly with another person," but a transfer by himself to himself and his wife as one person.

Another member of the bar thinks that the statute, being in derogation of the common law and therefore to be strictly construed, must be deemed to use the expression "jointly" as meaning in simple joint tenancy only. See *Hoag v. Hoag*, 213 Mass. 50 at 53. If you stretch it to mean "unitedly" to cover tenancy by the entirety it would also cover tenancy in common, which is absurd because no statute was needed.

Even, however, if the wife be considered "another person," then the conveyance is void as being between husband and wife, unless saved by the Act of 1912. This statute merely

authorizes conveyances of real estate "to each other;" that is to say, from husband to wife or from wife to husband. By virtue of the express limitations in this statute it would seem to me that its purpose was merely to do away with a conduit in a straight conveyance between husband and wife.

In a conveyance to joint tenants or to tenants by the entirety the estate must vest in the grantees at the same instant of time.

In your case when does the estate vest in the husband as grantee; when is he divested of his estate as grantor? That a man can not convey to himself is not a mere arbitrary rule of the common law. It is a physical fact which can not be abrogated by statute. The statute of 1918 to accomplish your purpose must be construed to operate by indirection, as a new sort of statute of uses. Either the grantor does not part with his title at all or else he conveys it to his wife. If he conveys it to his wife then the statute itself like the statute of uses instantaneously carries the fee by operation of law over into himself and wife as tenants by the entirety, which is not in any sense the conveyance of husband to wife "as if unmarried" authorized or contemplated by the Act of 1912.

The question is, I admit, a narrow one, and can be more easily avoided than raised. The difficulty is, as I understand the matter, that a number of such conveyances have been made already.

I should be interested to know what Messrs. ——— and ——— say after considering my point of view.

Yours very truly,

After this letter was written, one of the lawyers first consulted made the following comment:

"By 1912, c. 304, husband and wife may convey to one another 'as if unmarried.'"

If the wife were *unmarried*, she would be *another person* than her husband.

As she would thus be "another person" than her husband for the purposes of a conveyance from him, why then could not her husband under 1918, c. 93 convey real estate to himself jointly with her?

Note.

While in legal theory it is undoubtedly true that a tenancy by the entirety is a "united" holding by husband and wife as one person in view of the history of this form of tenure; yet, the fact remains that there are in fact two distinct persons concerned and this fact is recognized by the passage quoted from Chief Justice Field that

"Tenancy by the entirety is essentially a joint tenancy, modified by the common-law doctrine that husband and wife are one person" and that "they take by one estate."

Chapter 93 of 1918 provides for the creation of an estate to be held "jointly." The word "jointly" is not limited by anything in the statute to a strict joint tenancy.

The Act of 1912 provides that "Husband and wife may convey to each other as if unmarried." The rule of construction that a statute in derogation of the common law must be strictly construed does not seem to apply to either of these statutes, the obvious purpose of which was to simplify practice by avoiding the results of certain strict technicalities in conveyancing at common law.

Now, under the Act of 1912 standing alone, it seems clear that such a conveyance could not be made for the double reason that under that statute a man could not convey to himself except by a deed under the statute of uses and a tenancy by the entirety could not be conveyed by one married person to the other "as if unmarried" because the fact of marriage is an essential fact in a tenancy by the entirety.

But when the Act of 1918 removed the common law objection that a man could not convey to himself, there seems to be no reason for saying that the two statutes together should not operate upon the actual facts so that one of two persons can convey to the other person and himself to hold jointly under any tenure which is in its nature a joint holding and a tenancy by the entirety has been clearly described by the courts in the passage quoted in the foregoing correspondence as a form of "joint tenancy." There appears to be no reason in the nature of a tenancy by the entirety, when its history is considered in the light of modern practice, why the mere fact that these statutes are in derogation of the common law should lead the court to attribute to the legislature a strict intention to exclude from the operation of the statute any

joint holding in the absence of specific limitations in the statute requiring such a result.

It is submitted that the direct conveyance in question is operative and that it is not necessary to resort either to a deed through a third person as a conduit, or to a deed to uses under the statute of uses, in order that husband or wife may create a tenancy by the entirety in themselves. So far as the question of "vesting" is concerned the estate seems to vest in the two "by the entirety" just as any other estate conveyed under the act of 1918 "by a person to himself jointly with another person" vests. In each case the grantor by the delivery of the deed divests himself of his old estate and the newly created estate vests immediately in the grantees. The fact of vesting results from the statutes. No further legislation seems to be needed.

Supplementary Note.

Proof of the foregoing correspondence and of the note, was sent, before publication, to the writer of the *second* letter who reacted by saying "I have no comments but I am not in the least convinced," and so the interesting problem is passed on to the bar for its entertainment or annoyance as the case may be.

F. W. G.

COMMUNICATIONS TO THE EDITOR.

The Commonwealth of Massachusetts.

JUDICATURE COMMISSION.

(APPOINTED UNDER CHAPTER 223 OF THE ACTS OF 1919.)

249 STATE HOUSE, Boston.

To the Members of the Massachusetts Bar:

The undersigned commissioners have been appointed by the Governor, under Chapter 223 of the Acts of 1919

“To investigate the judicature of the commonwealth with a view to ascertaining whether any and what changes in the organization, rules and methods of procedure and practice of the several courts the number and jurisdiction thereof and the number and powers of the judges therein, and of the officers connected therewith, would insure a more prompt, economical, and just dispatch of judicial business.”

The Commission invites suggestions as to any matters which it is called upon to consider.

Written communications should be directed to the

Judicature Commission, Room 249, State House,
Boston, Mass.

HENRY N. SHELDON,
GEORGE R. NUTTER,
ADDISON L. GREEN,

Commissioners.

F. W. GRINNELL, *Secretary.*

RESOLUTIONS OF THE CONFERENCE OF STATE AND LOCAL BAR ASSOCIATIONS.

The Secretary has received the following communication:—

CONFERENCE OF STATE AND LOCAL BAR ASSOCIATIONS

Organized 1917

OFFICERS

MOORFIELD STOREY, Chairman
Boston, Mass.

JULIUS HENRY COHEN, Secretary
111 Broadway, New York City

STILES W. BURR, Vice-Chairman
St. Paul, Minn.

OCTOBER 10th, 1919.

DEAR SIR:

The meeting of delegates from State and local bar associations held at Boston on September 2nd was the best attended session thus far held of the Conference. Forty-two States were represented in the Conference; forty State bar associations were represented, from the following states: Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming. Forty-six local bar associations were represented, so that altogether there were eighty-six associations of the United States and three from outside of the United States, making a total of eighty-nine associations. One hundred and fifty delegates represented these. The subjects discussed were of vital interest to State and local bar associations. Enclosed herewith is a set of the resolutions adopted by the Conference, which I am transmitting for action by your association. One of these resolutions, you will observe, relates to the proposal of the American Judicature Society for the incorporation of the Bar in each State. It calls for the appointment of a committee of five, with a representative from each State bar association. You will receive, under separate cover, a copy of the proposed Act under discussion and in a short while you will

receive a copy of the Bulletin of the Conference giving a full account of the proceedings. In the meantime, it is important that you name a member of this committee who will undertake to study the plan, discuss it in your association, and be prepared to report the association's views at the next Conference.

Another resolution, you will observe, calls for the creation of a committee to prepare a brief for the use of State and local bar associations on what constitutes the practice of the law and what constitutes unlawful practice by laymen and corporations. To facilitate the work of this committee, may I ask you to send me a copy of your most recent statutes on the subject of the practice of the law and references to published decisions bearing upon the unlawful practice of the law by trust companies, collection agencies, notaries, etc. It is proposed to make this brief exhaustive and comprehensive, so that it may be of value to every bar association in the country. It will require the co-operation of every bar association to produce the result.

Thanking you for your co-operation, I remain,

Sincerely yours,

JULIUS HENRY COHEN,
Secretary.

**RESOLUTIONS ADOPTED AT MEETING OF CONFERENCE
AT BOSTON, MASS., ON SEPTEMBER 2nd, 1919.**

**RESOLUTION RELATING TO INCORPORATION OF THE BAR OF
EACH STATE.**

RESOLVED, that the Chair appoint a Committee of five, with a sub-committee of forty-eight—one from each State—to report on the question of incorporating the bar in the various States.

**RESOLUTION RELATING TO PRACTICE OF LAW BY TRUST
COMPANIES.**

RESOLVED, that it is the sense of this meeting that it is in the interest of society that the intimate and direct relationship of attorney and client shall be preserved, and that corporate or lay practice of law is destructive of that relationship and tends to lower the standard of professional responsibility;

RESOLVED FURTHER, that Trust Companies, while performing proper and legitimate functions of a business and fiduciary character are not constituted or organized for the purpose of furnishing legal advice to clients—drawing wills or furnishing legal services;

RESOLVED FURTHER, that the efforts of the Trust Company Section of the American Bankers' Association to eliminate evil practices on the part of Trust Companies be encouraged and the effort to co-operate with the bar be cordially welcomed;

RESOLVED, to that end, that we recommend to state and local bar associations that they bring to the attention of the Trust Company Section of the American Bankers' Association any evil practices of Trust Companies or bankers of which they are aware in order that the bankers' organization may, like the lawyers' organization, purge its ranks of wrongdoing or errors;

RESOLVED FURTHER, that a special committee of six be appointed to prepare for the use of state and local bar associations a careful brief of what constitutes practice of the law and what constitutes unlawful and improper practice of the law by laymen or lay agencies, and that said committee report at the next conference.

RESOLUTION FOR NEXT CONFERENCE PROGRAM.

RESOLVED, that this Conference meet again next year, and that a committee of five be appointed to prepare and outline a proper program for discussion.

RESOLUTION ON AERONAUTICAL LAW.

RESOLVED, that it is the sense of this Conference that aeronautics and aerography should properly lie within the admiralty jurisdiction of the United States and should be entertained accordingly; that a committee, representing each State of the United States here represented, be appointed to make further inquiry into this question and report its conclusions to the American Bar Association, to the end that the proper communication may be made to the Congress of the United States and appropriate legislation extending remedies to the aggrieved at common law may be enacted.

RESOLUTION ON INDEPENDENCE OF JUDICIARY.

RESOLVED, that this Conference approves with sympathy the course of conduct of the lawyers of New York City and New York State in their effort to bring about the election of competent judges, non-partisan, and that we recommend to the lawyers in every State similar action so that the bench may be taken entirely out of politics and be placed upon a plane where real lawyers, of admitted ability, may be called to the bench and may not have to dip into the hell of politics in order to get there.

RESOLUTION ON CONFLICT OF LAW FOR REMOVAL OF CAUSES
FROM STATE COURTS TO FEDERAL COURTS.

RESOLVED, that State and local bar associations be urged to take action looking to recommending such amendment of the existing provisions of the statute of the United States for the removal of suits from State to Federal courts that the meaning of terms now leading to uncertainty and disparity of administration shall be made more certain;

AND FURTHER, that in such removals, so far as may be deemed practicable, the same option as to a trial in a United States court be secured to a defendant within the limits of the judicial power of the United States as is now secured to a plaintiff in instituting this suit.

A RESOLUTION OF THE MISSOURI BAR ASSOCIATION.

The editor has received the following communication from the President of the Missouri Bar Association—

ST. LOUIS, MISSOURI, October 21, 1919.

MASSACHUSETTS LAW QUARTERLY,
MASSACHUSETTS BAR ASSOCIATION,
16 Central St., Boston, Mass.

GENTLEMEN:

Enclosed herewith find copy of resolution introduced at the annual meeting of the Missouri Bar Association, recently held at Kansas City, which was adopted, after full discussion, by a very large majority of the lawyers present. I am sending you copy in the hope that this will elicit publicity and editorial comment, favorable or otherwise.

Yours truly,

JAMES C. JONES.

RESOLUTION AS FINALLY ADOPTED.

WHEREAS, the Constitution of the United States and the Constitutions of the several states of the Union, make ample provision for changes or repeal through the exercise of lawful methods in fundamental laws of the United States and of the several States; and

WHEREAS, both Federal and State Governments have established, and so maintain, ample agencies through which changes in the law or repeal may be effected; and

WHEREAS, all classes of people have the right to avail themselves of the ballot, free speech and other lawful agencies, to accomplish such changes or repeal; and

WHEREAS, the use of physical force and violence to accomplish such changes in the law or repeal are unnecessary and un-American.

NOW, THEREFORE, BE IT RESOLVED, by the Missouri Bar Association, in regular meeting assembled, as follows:

THAT the Missouri Bar Association hereby recommends to the Congress of the United States and to the Legislature of each of the States in the Union, the passage of laws which shall, respectively, in substance, provide as follows:

THAT any person who shall privately or publicly advocate, either verbally or in writing, or attempt to bring about by individual action or by combining with others, any changes in or nullification of our laws, constitutional or statutory, state or national, by means of physical force or violence, shall be punished by imprisonment at hard labor, or, in the case of aliens, by deportation.

Note.

This whole subject was much discussed in the Massachusetts legislature and the press last spring prior to the passage of Chapter 191 of 1919. The resolution of the Missouri Bar Association above quoted is the subject of editorial comment recently in the Central Law Journal.

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A PROPOSAL TO EXTEND THE COMPENSATION PRINCIPLE TO ACCIDENTS IN THE STREETS.

(Reprinted from the Saturday Evening Record, May 31, 1919.)

To the Editor:

A while ago I saw an automobile destroying the life of a little boy. It made a great impression on me and this letter is one of the results.

I find that between 4,000 and 5,000 pedestrians are injured by automobiles and motor trucks each year in Massachusetts, and that between 200 and 300 are killed. From the reports of the Police Commissioner for the City of Boston it appears that the number of people killed in Boston by motor vehicles has increased about 800 per cent in the last 10 years, the injured about 500 per cent, and that killings and injuries by motor vehicles are half of all the killings and injuries that there are. With the coming of a greater number of automobiles and motor trucks, and with the greater weight and power of many of them, it is certain that, unless something is done about it, the situation will get steadily worse.

Accidents to pedestrians come almost entirely from the negligence of the pedestrians or driver, or both and could be largely prevented by more care. There are a great many things that can be done to make the pedestrians more careful. These ought to be done because the pedestrians are thoughtless in a very large number of cases, but the purpose of this letter is to deal not with the negligence of the pedestrian, but the negligence of the automobilist. The automobilists who do the most harm, I learn at the Highway Commission, are not the tyros or those under the influence of liquor, but the skillful, confident drivers who take chances. The most numerous class of victims is children.

THE PLAINTIFF AT GREAT DISADVANTAGE.

At present, in an effort to redress the wrongs of one who suffers from an accident, the law allows a suit to be brought. This means that the plaintiff must locate witnesses and prove negligence. Both may be difficult or impossible. A law case drags along in court for a year or two, the expenses of law-

yers, and of the physicians who testify as to the damages, are large and meantime the victim very likely lacks money when he most needs it. If he is poor, the lawyer has to advance the necessary expenses and he will never get them back, or get anything for himself, unless he settles or wins the case. As it is always uncertain whether he will win, he is under temptation to settle, even for an amount less than the plaintiff ought to have. The refinements that have grown up in the law as to negligence and contributory negligence are hard to understand; they afford grounds for appeals and new trials, and bear only a slight relation to the needs of the situation. In case a judgment is obtained, it may be impossible to collect it, because many people and corporations who run automobiles are financially irresponsible.

DEFENDANT IN BETTER POSITION THAN PLAINTIFF.

On the other hand, the automobilist is from the beginning in a much better position than the plaintiff because he is in good health, is on the spot, sees the accident (which the victim probably does not), can collect the evidence, and, more than all that, probably carries accident insurance, so that it does not make much difference to him anyway. If he is insured, he merely turns the case over to the accident insurance company, whose trained force gathers the evidence and relieves him of all harrowing details.

INSURANCE AGAINST NEGLIGENCE OPPOSED TO PUBLIC POLICY.

The business of the accident insurance companies in insuring automobilists is in some respects very objectionable. In the first place, what they offer to sell to automobilists is policies of insurance which are in effect licenses to do harm with impunity. These cost the automobilist only a trivial sum, \$25—\$90, and in consideration of that amount the automobilist is privileged to be reckless. After an accident, the insurance company gets out of it as cheaply as it can without much care as to what becomes of the victim. Although on general principles of humanity the victim is entitled to sympathy and help, the insurance company drives as hard a trade with him as it can. It is forced into this position by a bad system of law and by competition. Many of these acci-

dent companies are companies from foreign countries, or other states, and anything they make out of harsh settlements may be distributed among foreign stockholders, leaving the care of the victim to his family, to private charity, or Massachusetts tax payers. Furthermore, the more pedestrians that are run down, the more will pedestrians as a class seek to be insured by the insurance companies, who will thus get increased business and charge a higher rate.

INJUSTICE OF THE PRESENT SITUATION.

In an impact between an automobile and a pedestrian, the automobile can injure the pedestrian; the pedestrian cannot injure the automobile. The chances are all one way. Moreover, it is the automobilist who gets the pleasure or profit from the machine; the pedestrian gets none. The advantages are all one way. In the law there is a rule as to contributory negligence which is that if the plaintiff's want of due care contributes to the result, he can recover nothing, no matter how negligent the defendant is. Therefore, where a pedestrian is negligent, or where both parties are negligent, the loss not only in pain and suffering, but in money also, always falls on the pedestrian. On account of this contributory negligence doctrine of the law the pedestrian, in a large percentage of cases, can recover nothing.

In the excellent report of the Highway Commission for 1916 appears an analysis of a number of automobile accident cases. Of 265 pedestrians killed, the commission thought that the pedestrian was wholly at fault in 162 instances and partly at fault in 43 more. If this is a fair average and juries should find as the commission found, it means that in four-fifths of the fatal accidents to pedestrians the plaintiff can recover nothing. I judge that where the victim of the accident is dead, his side of the case does not get convincingly represented.

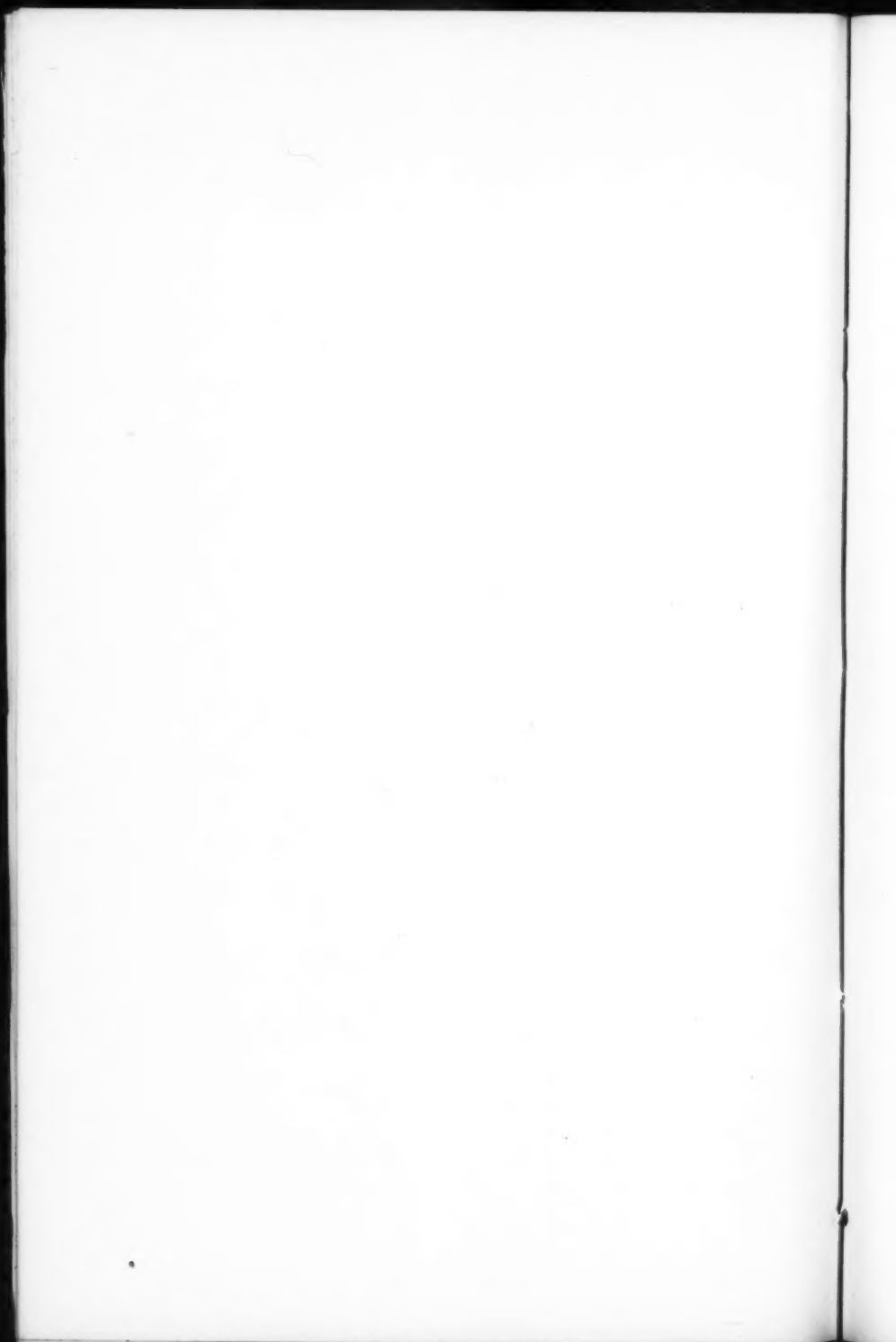
In every aspect, the pedestrian has the bad end of the situation and the automobilist the good end. Putting everything together, the difficulties of a law suit, the injustice of the contributory negligence rule, the fact that it is always the pedestrian that is hurt and never the automobilist, the fact that it is always the automobilist that gets the benefit from the machine and never the pedestrian, and the fact that through the insurance companies the automobilists are consolidated

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against the individual victim in the hospital, the situation is very bad indeed. A condition has gradually and quietly come into existence, the injustice of which is not recognized until it is pointed out.

REMEDIES FOR PRESENT BAD SITUATION.

There are three things which ought to be done about it:

1. Reduce the number of accidents.
2. Provide an easier, quicker, surer and less expensive way for an injured person to get what little compensation money will give him.
3. See to it that his rights are not defeated by the financial irresponsibility of the automobilist.

These three things can be accomplished. The best way to go about it is as follows:

A public indemnity company, corresponding to the mutual insurance company provided for by the Workmen's Compensation Statute, should be organized under suitable legislation to be passed for that purpose, and no operator of a motor vehicle should be allowed the use of the highways until he has joined this indemnity company and paid to it the necessary charges on a mutual basis. This indemnity company, as soon as an accident to a pedestrian takes place, would pay him compensation without the delays and difficulties of a law suit. This simple expedient of the indemnity company would take care of two needs of the situation, i.e., the avoidance of the uncertainties, delays and expense of a law suit, and the financial irresponsibility of the defendant.

But how about the more important matter of preventing accidents? That would be attended to equally simply by the application of elementary principles: Immediately on payment of compensation to the person injured the Indemnity Company would on the ordinary rules of suretyship be subrogated to the injured person's rights of action against the automobilist. This is not true as to an insurance company. The trade that an insurance company makes is that it will stand the loss and protect the automobilist. So the effect of the proposed Indemnity Company would be quite different from the effect of the insurance companies, for if

the automobilist was at fault the Indemnity Company could proceed against him in court and get its money back. This would fix individual responsibility on the automobilist and restore the principle of personal responsibility which the accident insurance companies have quietly nullified. The carrying out of this plan would make it safer for all using the highways, and would make it cheaper for the careful automobilist, who at the present time carries the burden of the careless driver. The Indemnity Company would be an attacker of negligence, not a defender of negligence, as the insurance companies are. The driver of a pleasure machine would, if he felt that he would really have to pay for the harm that his negligence caused, scorch less carelessly, and the concern that has a number of powerful motor trucks, and who at present puts them in the hands of incompetent drivers because it can get them cheaply, would mend its ways.

To sum up, the plan outlined above would diminish the number of accidents and make a much better and simpler provision for the care of the injured.

If these ideas provoke the approval or disapproval of anybody, I should be glad to hear from him either direct or through the columns of your paper. What they amount to is an adaption of the Workmen's Compensation principle to accidents in the streets.

WELD A. ROLLINS,
National Shawmut Bank Building, Boston.

THE PRIZE OFFERED BY THE AMERICAN
PHILOSOPHICAL SOCIETY.

The following announcement received by the editor for publication is here printed for the information of the bar.

THE AMERICAN PHILOSOPHICAL SOCIETY

Held at Philadelphia
for Promoting Useful Knowledge

announces that an award will be made in the year 1921 of the

HENRY M. PHILLIPS PRIZE

The subject upon which essays are to be submitted is

The Control of the Foreign Relations of the United States: The Relative Rights, Duties, and Responsibilities of the President, of the Senate and the House, and of the Judiciary, in Theory and in Practice.

The essay shall contain not more than one hundred thousand words, exclusive of notes, and must be in the possession of the Society on or before December 31, 1920.

The Prize for the crowned essay will be Two Thousand Dollars, in gold coin of the United States, to be paid as soon as may be after the award.

Attention is called to the regulations governing the award of the Prize, which will be found on a following page.

JOHN BASSETT MOORE,
DAVID JAYNE HILL,
SIMEON E. BALDWIN,
JOHN CADWALADER,
W. W. KEEN,
WILLIAM B. SCOTT,
President, *ex officio*,
Committee.

*The essays must be sent, addressed to the
President of the American Philosophical Society,
No. 104 South Fifth Street, Philadelphia, U. S. A.*

The Henry M. Phillips Prize Fund was presented to the American Philosophical Society, by Miss Emily Phillips of Philadelphia in honor of the memory of her brother, Henry M. Phillips. In furtherance of the wishes of the donor, the Society has adopted the following

REGULATIONS

Competitors for the prize shall affix to their essays some motto or name (not the proper name of the author, however) and when the essay is forwarded to the Society it shall be accompanied by a sealed envelope containing within the proper name and address of the author and on the outside thereof the motto or name adopted for the essay.

At a stated meeting of the Society in pursuance of the advertisement, all essays received up to that time shall be referred to a Committee of Judges, to consist of five persons, who shall be selected by the Society from nominations made by the Committee on the Henry M. Phillips Prize.

Essays may be written in any language, but, if not in English, must be accompanied by an English translation.

No essay which has been already published or printed, or for which the author has received any prize or profit of any nature whatsoever, shall be accepted in competition for the prize.

Essays must be typewritten on only one side of the paper, and six copies must be furnished by their respective authors for the use of the Committee of Judges.

The literary property of such essays shall be in their author, subject to the right of the Society to publish the crowned essay in its "Transactions" or "Proceedings."

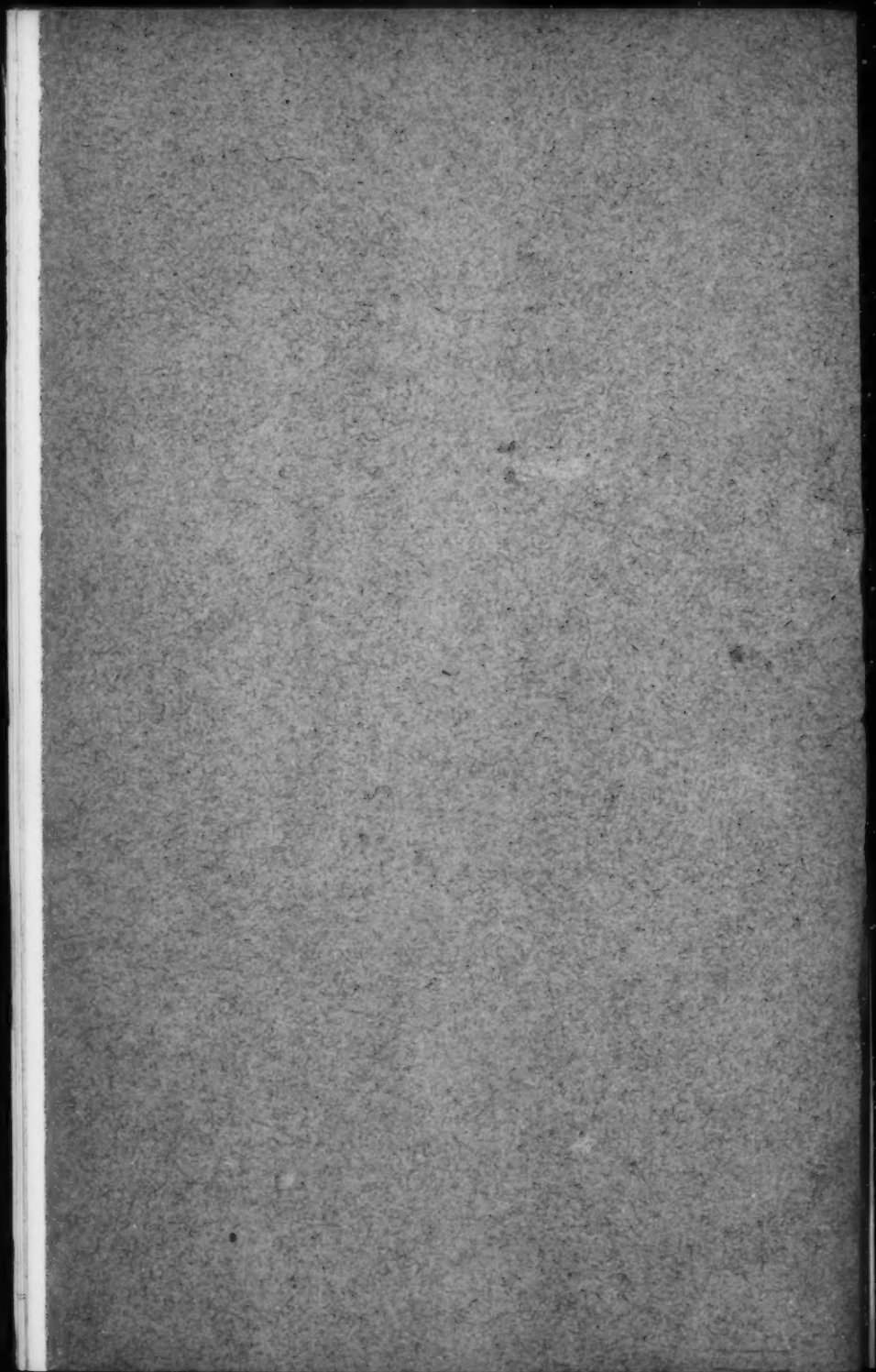
The Society reserves the right not to award the prize if none of the competing essays is deemed worthy of it.

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